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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. [redacted]6 11

R. S. STERLING, Governor of Texas, ET AL.,
Appellants,

vs.

E. CONSTANTIN, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANTS.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 746

R. S. STERLING, Governor of Texas, ET AL.,
Appellants,

vs.

E. CONSTANTIN, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANTS.

I.

Official Report of the Opinion Below.

The opinion of the District Court for the Eastern District of Texas in this case is reported in Constantin, et al., vs. Smith, et al., 57 Fed. (2d) 227. The opinion also appears on pages 103 et seq. of the Printed Record.

II.

Jurisdiction.

There has heretofore been filed in this court a printed statement of basis on which Appellants contend this court has jurisdiction to review on appeal the decree appealed from in this case.

III.

Statement of the Case.

The Appellant, Hon. R. S. Sterling, Governor of the State of Texas, on August 16, 1931, declared by formal proclamation a state of insurrection, tumult, riot and breach of the peace, and imminent danger of insurrection, tumult, riot and breach of peace, to exist in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas. (R. 90).

In the above mentioned proclamation, the Governor of Texas directed the Appellant, Hon. Jacob F. Wolters, Brigadier General Texas National Guard, to assume supreme command of the situation in the territory affected and without delay shut down each and every producing crude oil well and/or producing well of natural gas, and to further take such steps as he might deem necessary to enforce and uphold the majesty of the law, subject to the orders of the Governor. (R. 90).

Subsequently, and after the Railroad Commission of Texas, which body is authorized by law to enforce the conservation laws of the State of Texas in regard to the production of oil, had on September 2, 1931, made and caused to be entered an order fixing the amount of oil that could be produced from any producing oil well in the Counties of Gregg, Upshur, Rusk and Smith, the Governor then permitted the oil wells to reopen and to produce oil at the rate of 225 barrels per day per well, as authorized by the order of the Railroad Commission of Texas. (R. 78).

On September 18, 1931, the Railroad Commission issued and promulgated a supplemental order reducing the allowable production of oil per well, in the East Texas district, from 225 barrels per day to 185 barrels of oil per day. (R. 97).

On October 10, 1931, the Railroad Commission of Texas issued a second supplemental order reducing the daily well allowable of crude oil from 185 barrels to 165 barrels per well. (R. 98).

Each and all of the several orders issued by the Railroad Commission of Texas, fixing the daily well allowable of crude oil in the East Texas district, expired by its terms on October 31, 1931. (R. 99).

The Governor permitted oil to be produced from the oil wells located in the Counties of Gregg, Upshur, Rusk and Smith, which counties are in East Texas and constitute what is known as the East Texas Oil Field, in the amounts named in the sev-

eral orders of the Railroad Commission of Texas fixing the daily well allowable of crude oil produced. (R. 78).

After October 31, 1931, there was no order of the Railroad Commission of Texas fixing the daily allowable of crude oil produced in the East Texas Oil Field. On October 29, 1931, the Governor, by executive order, directed General Wolters to limit production to 150 barrels of oil per day per well. In this proclamation, the Governor stated:

"I believe that it is necessary, as a precaution against acts of insurrection, riot, breach of peace, tumult and general disorder, of which there is imminent danger in the aforesaid counties, and that it is a proper measure and the only means at my command to suppress the existing insurrection in said counties and prevent further acts of insurrection, riot, tumult, breach of peace and general disorder in said counties, and to remove the existing imminent danger of such unlawful acts in said counties, for me to cause oil production from each well in said counties to be limited and restricted for the present to 150 barrels of oil per day." (R. 93-94.)

On November 6, 1931, the Governor issued another executive order to General Wolters, and for the same reasons as those given in executive order of date October 29, 1931, the Governor directed General Wolters to restrict and limit the production of oil in the above named counties to 125 barrels of crude

petroleum to be produced per day from each well. (R. 95).

On December 10, 1931, by executive order, the Governor directed General Wolters, and for the same reasons given in executive order of date October 29, 1931, to restrict and limit the production of oil to 100 barrels of crude petroleum to be produced per day from each well. (R. 96).

The original bill of complaint averred that the statutes of the State of Texas, by authority of which the Railroad Commission of the State of Texas acted in making the orders fixing the amount of oil and gas that an operator of an oil and gas well could produce, were invalid because in violation of the Constitution of the United States, and that the orders so made by the Railroad Commission were likewise in violation of the Constitution of the United States.

Afterwards, by amended pleadings, the Governor of the State of Texas, Hon. R. S. Sterling, and the Adjutant General of the State of Texas, Hon. W. W. Sterling, were made parties to this suit. Hon. Jacob F. Wolters, Brigadier General Texas Nation Guard, was an original party defendant to the suit.

By amended pleadings it was averred, in addition to averments contained in the original petition, that the Defendant R. S. Sterling, Governor of Texas, had declared Martial Law in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, and, with the aid and assistance of Defendants W. W.

Sterling, Adjutant General of the State of Texas, and Jacob F. Wolters, Commanding Officer of the military forces in the above named counties, were taking the property of complainants without due process of law and in violation of the 14th Amendment to the Constitution of the United States, in this, that by force of arms complainants were compelled to restrict production of oil from their wells to 100 barrels of oil per day, when each of Appellees' wells was capable of producing, without physical waste, 500 barrels per day.

By amended pleadings, it was further averred by complainants that the statutes of the State of Texas, authorizing the Governor to use military force to suppress insurrection, riot and breach of the peace, were unconstitutional in this, that said statutes were in violation of the Constitution of the United States. (R. 1-19-48-49).

The answer of the Railroad Commission of Texas, which was made a defendant by complainants' original bill and continued as a defendant by complainants' amended pleadings, was to the effect, among other things, that the orders of the Railroad Commission, which were sought to be enjoined, had by their own terms expired on October 31, 1931, and that said Railroad Commission at the time complainants' application for temporary injunction was heard were not attempting or threatening to enforce any of its orders limiting the per well production of

oil in the East Texas district, or limiting the oil-gas ratio complained of in complainants' bill. (R. 99).

No interlocutory injunction was issued as against the Railroad Commission. The temporary injunction granted was against the Appellants, R. S. Sterling, Governor of Texas, W. W. Sterling, Adjutant General of Texas, and Jacob F. Wolters, Brigadier General Texas National Guard.

This suit, insofar as these Appellants are concerned, was brought for the purpose of enjoining them, and each of them, from enforcing the orders of the Governor fixing the amount of oil that could be produced from each of the four wells owned by Appellees, which wells are situated in the counties above named. (R. 19).

The application of Apellees for a temporary restraining order was heard in Houston, Texas, on January 4, 1932, before a three-judge court organized as provided by Section 266 of the Judicial Code (28 USCA, Sec. 380); and, thereafter on the 26th day of February, 1932, said court granted the temporary injunction as prayed for, the decree of the court being to the effect that Hon. R. S. Sterling, Governor of Texas; Hon. W. W. Sterling, Adjutant General of Texas; and Hon. Jacob F. Wolters, Brigadier General Texas National Guard, "and all persons acting for or with or under the direction of them, be and they are hereby enjoined from enforcing against complainants any of their so-called mili-

tary or executive orders, passed or to be passed, regulating or restricting the production of oil from the complainants' wells, or from in any manner, directly or indirectly, interfering with the lawful production of oil from complainants' property. This injunction to remain in force subject to further orders of this court until the final adjudication of this cause . . . ." (R. 103).

IV.

Specification of Errors.

1. The court erred in granting the injunction as against these Appellants, and as against each of them, because the judgment, order or decree of the court, granting such interlocutory injunction, is without support, either in the facts or by the law of this case. (Appellants' 10th Assignment of Error. R. 395).

2. The court erred in finding that it had jurisdiction to hear, determine and grant the injunction against these Defendants, the Governor of Texas, the Commanding Officer of the military forces of the State of Texas, and the Adjutant General of the State of Texas. (Appellants' 1st Assignment of Error. R. 393).

3. The court erred in finding that it had jurisdiction to inquire into and determine whether, as a matter of fact, an insurrection or riot, or imminent

danger thereof, existed in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, at a time when the Governor of Texas, in the exercise of his discretion and judgment, had determined that an insurrection and riot, or imminent danger thereof, did exist, and had by proclamation declared Martial Law, which was in force and effect at the time of the hearing and decision of this case, and which was declared for the purpose of suppressing and preventing insurrection and riot in said Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas. (Appellants' 2nd Assignment of Error. R. 393-394).

4. The court erred in finding that the evidence showed no insurrection or riot existed in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, on August 16, 1931, or on October 13, 1931, or at the time this cause was heard and decided by this court. (Appellants' 3rd Assignment of Error. R. 394).

5. The court erred in finding that there was no warrant in the evidence for the belief, on the part of the Defendants and Appellants, R. S. Sterling and Jacob F. Wolters, that there was imminent danger of insurrection or riot in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, on August 16, 1931, or on October 13, 1931, or at the time this case was heard and decided by this court. (Appellants' 4th Assignment of Error. R. 394).

6. The court erred in finding that the Defendant and Appellant, R. S. Sterling, as Governor of Texas, had ousted the Railroad Commission of the State of Texas from the exercise of its jurisdiction in the matter of enforcing the conservation laws of the State of Texas, as applied to the production of crude petroleum. (Appellants' 5th Assignment of Error. R. 394).

7. The court erred in finding that the Defendant and Appellant, R. S. Sterling, as Governor of the State of Texas, had no authority under the Constitution and laws of the State of Texas to declare Martial Law. (Appellants' 6th Assignment of Error. R. 394).

8. The court erred in finding that the restriction placed by the Governor upon the production of crude petroleum by the Plaintiffs, during the existence of Martial Law under the Constitution and statutes of Texas, as a means of preventing and suppressing insurrection and riot, or imminent danger thereof, was a taking of the plaintiffs' property or a tresspass upon the property rights of the Plaintiffs, in violation of the 14th Amendment to the Constitution of the United States. (Appellants' 7th Assignment of Error. R. 394-395).

9. The court erred in finding that this suit, insofar as it is against these Defendants and Appellants in their official capacities, as Governor of the State of Texas, as Adjutant General of the State of

Texas, and as Commanding Officer of the military forces during martial law, was not a suit against the State of Texas. (Appellants' 8th Assignment of Error. R. 395).

10. The court erred in granting the injunction against these Defendants and Appellants, enjoining them, and each of them, in their official capacity, from interfering with the production of oil by plaintiffs from land situated in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, at a time when, according to the judgment and discretion exercised by the Defendant and Appellant R. S. Sterling as Governor of the State of Texas, there was insurrection, riot and tumult, and imminent danger thereof, in said counties, and at a time when by proclamation of the Governor martial law was being maintained and enforced in said counties. (Appellants' 9th Assignment of Error. R. 395).

11. The court erred in holding that it had jurisdiction to review, inquire into, and control by injunction the means employed by the Defendant and Appellant, R. S. Sterling as Governor of Texas, under martial law, to suppress the insurrection and riot, and imminent danger thereof, found and declared by him to exist in his proclamation declaring Martial Law, in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, and in substituting its judgment and discretion for that of the

Governor of Texas in determining the means to be employed under Martial Law to suppress the riot and insurrection, and imminent danger thereof, found to exist in the proclamation declaring Martial Law. (Appellants' 11th Assignment of Error. R. 395-396).

V.

Summary of Argument.

Point A. There is an abuse of judicial discretion by the court, in granting the interlocutory injunction, because:

1. Appellees' petition and bill of complaint does not set forth facts sufficient to constitute cause of action at law, or in equity, against Appellants.

2. The bill of complaint is obviously devoid of equity upon its face.

3. The act sought to be enjoined is a lawful act, and was not done maliciously to vex, annoy and injure Appellees.

Point B. The act of the Governor in restricting production of crude oil by plaintiffs during the existence of insurrection and riot and imminent danger thereof in the East Texas Oil Field was a lawful act and necessary in order to suppress and prevent insurrection and riot.

VI.

Argument.

Point A. Summarized, this point is to the effect that it was an abuse of judicial discretion for the court to enjoin Appellants, as was done, because Appellees' petition and bill of complaint does not set forth facts sufficient to constitute a cause of action at law or in equity against those sought to be enjoined, and the bill of complaint is obviously devoid of equity upon its face, and because the act sought to be enjoined is a lawful act, and was not done maliciously to vex, annoy and injure another.

Authorities.

Osborne vs. Bank, 9 Wheaton 866,
Truly vs. Wanzer, 5 Howard 141,
Mast F. & Co. vs. Stover Mfg. Co., 177 U. S. 495,
Castner vs. Kaufman, 178 U. S. 183,
Kryptok Co. vs. Stead Linz Co., 190 Fed. 767,
Hanover Star Milling Co. vs. Allen & Wheeler, 208 Fed. 513,
Smith vs. Hill, 5 Fed. (2d) 188.

It it established law in this court that the discretion exercised by a three-judge court, in granting or refusing to grant an application for an interlocutory injunction, will not be disturbed on appeal by this court, except for abuse of judicial discretion in

so granting or denying the application. Alabama vs. United States, 49 S. Ct. 266. It is believed that the granting of the interlocutory injunction in this case was an abuse of judicial discretion.

The definition of "judicial discretion" most often cited by the courts is that of Chief Justice Marshall in Osborne vs. Bank, supra, which definition is as follows:

"Judicial power, as contradistinguished from the power of the law, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discovered, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."

There is, of course, no better established rule of law than that the granting of a preliminary or temporary injunction is a matter resting largely in the discretion of the trial court. This discretion, however, is a legal discretion, and, as said by Chief Justice Marshall, "is exercised for the purpose of giving effect to the will of the law."

In Hanover Star Milling Co. vs. Allen & Wheeler Co., 208 Fed. 513, the court says:

"Though an order granting or denying a preliminary injunction will not be disturbed except for an abuse of discretion, a proper discretion does not include the misapplication of the law to conceded facts." Citing Winchester Repeating Arms Co. vs. Homestead, 203 Fed. 493.

In Truly vs. Wanzer, supra, this court quotes with approval the following language:

"There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of equity, that never ought to be extended, unless to cases of great injury, where courts of law cannot afford an adequate and commensurate remedy in damages. The right must be clear, the injury impending and threatened, so as to be averted only by the protection of preventive process of injunction."

The statement cannot be over-emphasized that before injunction issues "the right must be clear" on the part of the plaintiff to an injunction.

It is believed that Appellees were not, under the law, entitled to a temporary injunction. Their right to injunctive relief not only is not clear, but, it is believed that the legal right to the relief they sought and obtained does not exist. If we are correct in this contention, it necessarily follows that the granting of a temporary injunction was an

abuse of judicial discretion. In granting or refusing a temporary injunction, the court must be guided by conclusions based upon the law and the facts disclosed by the particular case. We think it is clear that where a court grants a temporary injunction, where plaintiff is not entitled as a matter of law to the injunction, that there is and must necessarily be an abuse of judicial discretion in the granting of the injunction.

Circuit Judge Sandborne, in the case of Kryptok vs. Stead Linz Co., supra, lays down the generally accepted rule of law in regard to the matter under discussion. Judge Sandborne said:

"The granting of a preliminary injunction rests in the disretion of the trial court, not in its arbitrary, whimsical will, but in its sound judicial discretion, informed and guided by the established principles, rules and practices of equity jurisprudence; and where the court has not departed from them, its injunctional orders may not be reversed without clear proof of an abuse of its discretion."

The foregoing statement is sound authority for the proposition that where a court issues a temporary injunction contrary to "the established principles, rules and practices of equity jurisprudence," that its action must be reversed by the higher court. It becomes important to ascertain what are the established principles, rules and practices of equity

jurisprudence. Judge Sandborne, in the Kryptok case, states what these established principles of equity jurisprudence are. He says:

"One may not be enjoined from doing lawful acts to protect or enforce his rights of property or of persons, unless his acts to that effect are clearly shown to be done unnecessarily, and not for the purposes of preserving and enforcing his rights, but maliciously to vex, annoy and injure another."

It appears clearly from the foregoing statement of established principles of equity jurisprudence that the three-judge court, in granting the temporary injunction against the Governor, the Adjutant General and General Wolters, did abuse its judicial discretion, provided the acts of the Governor, the Adjutant General and General Wolters which were enjoined were lawful acts and were not done maliciously to vex, annoy and injure Appellees.

The Appellants were acting for the purpose of protecting the State of Texas in its inherent right as a government to maintain law and order, and to prevent and suppress insurrection and riot and imminent danger thereof. If the acts enjoined were lawful, then the judgment of the three-judge court, in enjoining the Appellants from the performance of these lawful acts, was an abuse of judicial discretion.

It is believed that Appellees' bill of complaint

shows on its face that the acts of Appellants, which were sought to be enjoined, were lawful acts, and therefore the bill was devoid of equity.

As we understand the decision of this court in Mast F. Co. vs. Stover Mfg. Co., supra, it is established law in this court that an interlocutory injunction granted upon a bill of complaint devoid of equity discloses such an abuse of judicial discretion as to warrant this court in reversing the judgment of the lower court. In the Mast case, immediately upon filing the bill of complaint motion was made for a preliminary injunction and the motion was granted. From this action of the trial court an appeal was taken to the Circuit Court of Appeals. The Circuit Court of Appeals not only reversed the order for the injunction, but dismissed the bill. From this action of the Circuit Court, Mast Foos & Co. applied for and was granted a writ of certiorari from this court. The judgment of the Circuit Court of Appeals was by this court affirmed, and, in the course of its opinion this court said:

"One of the principal questions pressed upon our attention related to the power of the Court of Appeals to order the dismissal of the bill before answer filed, or proofs taken, upon appeal from an order granting a temporary injunction.

"This question is not necessarily concluded by Smith v. Vulcan Iron Works, 165 U. S. 518, since in that case the interlocutory injunction was granted after answer and replication filed, a full hearing had

upon pleadings and proofs, and an interlocutory decree entered adjudging the validity of the patent, the infringement and injunction, and a reference of the case to a master to take an account of profits and damages. In that case we held that, if the appellate court were of opinion that the plaintiff was not entitled to an injunction because his bill was devoid of equity, such court might, to save the parties from further litigation, proceed to consider and decide the case upon its merits, and direct a final decree dismissing the bill.

"Does this doctrine apply to a case where a temporary injunction is granted pendente lite upon affidavits and immediately upon the filing of a bill? We are of opinion that this must be determined from the circumstances of the particular case. If the showing made by the plaintiff be incomplete; if the order for the injunction be reversed, because injunction was not the proper remedy or because under the particular circumstances of the case, it should not have been granted; or if other relief be possible, notwithstanding the injunction be refused, then, clearly, the case should be remanded for a full hearing upon pleadings and proofs. But if the bill be obviously devoid of equity upon its face, and such invalidity be incapable of remedy by amendment; or if the patent manifestly fail to disclose a patentable novelity in the invention, we know of no reason why, to save protracted litigation, the court may not order the bill to be dismissed. . . . Or, if not question be made regarding the identity of the alleged infringing device, and it appear clear that such device is not an infringement, and no suggestion be made of further proofs upon the subject, we think the

court should not only overrule the order for the injunction, but dismiss the bill. Gardt v. Brown, 113 Illinois, 475. This practice was approved by the Chief Justice in a case where the bill disclosed no ground of equitable cognizance, in Greene v. Mills, 25 U. S. App. 383, and by the Circuit Court of Appeals for the Sixth Circuit in Knoxville v. Africa, 47 U. S. App. 74, where the question involved was one of law and was fully presented to the court. The power was properly exercised in this case."

In Castner vs. Coffman, supra, application was made for an injunction to enjoin the use of the name "Pocahontas" or "Pocahontas Flat Top" by defendants in connection with their coal mining operations. Affidavits and exhibits were filed with the bill in support of the motion for injunction, and demurrers to the bill having been overruled the defendant filed an answer accompanied by affidavits and exhibits in opposition to the motion for an injunction. Several affidavits in rebuttal were thereupon filed on behalf of complainants. Upon the record thus made the motion for injunction was heard, and after consideration by the court an injunction was granted. The defendant appealed to the Circuit Court of Appeals for the 4th Circuit. The Circuit Court of Appeals reversed the decree of the trial court and remanded the cause with directions to dismiss the bill. The cause was then brought to this court by writ of certiorari.

The judgment of the Circuit Court, refusing and

directing dismissal of the bill of complaint, was by this court affirmed. In the course of its opinion this court (exact page 184) said:

"As respects the case at bar, we are satisfied from the averments of the bill and the proof that no supplementary evidence could be offered which would alter the indubitable conclusion that no exclusive right to the trademark or trade name Pocahontas exists in the complainants. Further, we concur in the conclusion of the Circuit Court of Appeals, that the bill, upon its face, is devoid of equity."

In Smith vs. Hill, supra, decided by the Circuit Court of Appeals for the 3rd Circuit, opinion by Circuit Judge Woolley, an appeal was taken from the action of the District Court in refusing to approve or confirm a bid made at a receivers sale, and charging that the trial court in refusing confirmation abused his discretion, in that he acted on an absence of evidence that the bid was grossly inadequate. In passing on this point the court used the following language:

"If this be true, he erred, for judicial discretion is not an indulgence of a judicial whim, but is the exercise of judicial judgment based on the facts and guided by law."

The Circuit Court then reviewed all of the facts in the case and determined that the facts did sup-

port the action of the trial court in refusing to approve or confirm the bid made by Appellant at the receivers sale.

The point in the case is that where abuse of judicial discretion is alleged, whether in the granting of a temporary injunction, or in some other matter, it is the duty of the appellate court to ascertain whether the action of the trial court, in its alleged exercise of judicial discretion, was "guided by law," and whether its action was supported by the evidence.

It is believed that this court must necessarily inquire into and determine, first, whether the acts of Appellants, which were enjoined by the three-judge court, were lawful acts and not done maliciously to vex, annoy and injure Appellees; second, whether the bill of complaint be obviously devoid of equity upon its face; and third, whether Appellees' bill of complaint sets forth facts sufficient to constitute a cause of action at law or in equity against the Appellants whose acts were sought to be enjoined.

Point B. Summarized, Point B is to the effect that the acts of Appellants which were enjoined are lawful acts.

Authorities.

Constitution of Texas, Art. 4, Sections 1, 7 and 10,
Articles 5889, 5834, 5830, 5778, Revised Civil Statutes of Tex., 1925,

Moyer vs. Peabody, 212 U. S. 78,
Mitchell vs. Harmony, 13 Howard, 115,
Martin vs. Mott, 12 Wheaton, 19,
Stewart vs. Kahn, 78 U. S. 176,
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New York vs. Town of Bristol, 151 U. S. 556,
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Ex parte McDonald, 45 Montana 454,
In re Boyles, 6 Idaho, 609,
Ely vs. Smith, 71 Mass. 121,
54 Corpus Juris, 841, 842,
Hair on American Constitutional Law, Lec. 42, page 924,
Illinois Law Review, Vol. 23, page 766.

The Governors' declaration that a state of insurrection and riot, and imminent danger thereof, existed is conclusive evidence of that fact.

This court, in Moyer vs. Peabody, supra, said:

"It is admitted, as it must be, that the Governor's declaration that a state of insurrection existed is conclusive of that fact."

In the case of United States vs. Wolters, supra, Judge Rufus Foster, now United States Circuit Judge for the 5th Circuit, used the following language:

"There is no doubt that by the Constitution and laws of Texas the Governor is charged with the duty of enforcing the laws of the State, and has authority to call out the militia to enforce the laws in case of riot or breach of peace, or imminent danger thereof. The question as to whether there is riot, or insurrection, or breach of peace, or danger thereof, is one solely for the Governor. The courts will not interfere with his discretion in that and will not inquire as to whether or not the facts justify the Governor."

In United States vs. Fischer, supra, the court said:

"The Governor may make the ordinary use of soldiers to suppress an insurrection, and his declaration of the existence of a state of insurrection is conclusive."

In the case of in re Boyles, supra, the Supreme Court of Idaho said:

"On application for writ of habeas corpus, the truth of the evidence of the alleged facts in a

proclamation issued by the Governor proclaiming a certain county to be in a state of insurrection will not be inquired into or reviewed."

In State vs. Brown, supra, the Supreme Court of West Virginia, in discussing this question, used the following language:

"It seems to be conceded that if the Governor has the power to declare a state of insurrection, his action in doing so is not reviewable by the courts. Of the correctness of this view we have no doubt. The function belongs to the executive and legislative departments of the Government, and is beyond the jurisdiction and power of the courts."

In Franks vs. Smith, supra, the Supreme Court of Kentucky used the following language:

"It will be observed that there is no limitation, either in the Constitution or statutes, upon the power vested in the Governor to order into active service the militia of the State, or to direct into what locality they shall go or operate. He is made the sole judge of the necessity that may seem to demand the aid and assistance of the military forces of the state in suppressing disorder and restoring obedience to the law. . . . But to his good judgment and sound discretion the law has left the final decision as to whether the military arm of the state shall be ordered into active service. If he acts wisely and prudently, well and good. If he acts hastily and unwisely or imprudently, there is no power in the courts to

control or restrain his acts. Any attempt on the part of the judicial department of the state so to do would be an interference by one department of the government with the power lodged in another department."

In the case of in re Moyer, supra, the Supreme Court of Colorado said:

"By Section 5, Article 4, of our Constitution, the Governor is the commander-in-chief of the military forces of the State, except when they are called into active service of the United States, and he is thereby empowered to call out the military to suppress insurrection. It must, therefore, become his duty to determine what facts and conditions exist in a given locality which demand that in the discharge of his duties, as chief executive of the State, he shall employ the military to suppress. This being true, the recital in the proclamation to the effect that a state of insurrection existed in the County of San Miguel cannot be controverted. Otherwise, the legality of the orders of the executive would not depend upon his judgment but the judgment of another co-ordinate branch of the state government."

This court, in the case of Martin vs. Mott. 12 Wheaton 19, in a great and an elaborate opinion by Mr. Justice Storey, among other things, said:

"Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of con-

struction that the statute considers him the sole and exclusive judge of the existence of these facts."

We now respectfully direct the attention of the court to the controlling provisions of the Constitution and statutes of Texas.

Article 4, Section 1, of the Constitution declares:

"The executive department of the State shall consist of a Governor, who shall be the chief executive officer of the State . . ."

Section 10, Article 4, of the Constitution of Texas provides that the Governor:

"shall cause the laws to be faithfully executed. . ."

In order to obey the mandate of the people as contained in the Constitution, Section 7, Article 4, provides that the Governor:

"shall have power to call forth the militia to execute the laws of the State, to suppress insurrection. . . " etc.

The Legislature of Texas has provided, in Article 5889 Revised Civil Statutes of 1925, that:

"Whenever any portion of the military forces of this State is employed in aid of civil authority, the Governor, if in his judgment the maintenance of

law and order will thereby be promoted, may, by proclamation, declare the county or city in which the troops are serving, or any specific portion thereof, to be in a state of insurrection."

The term used in the foregoing statute, "employed in aid of civil authority," is not limited, of course, to aiding and assisting the sheriff, chief of police or constables of the city or town, but must necessarily mean, and does mean, in aid of civil government in all its scope, influence, authority and power.

Article 5834 declares:

"The Governor may order the active militia, or any part thereof, to assist the civil authorities in guarding prisoners, or in conveying prisoners from and to any point in this State, or discharging other duties in connection with the execution of the law as the public interest or safety at any time may require."

The power given the Governor, by the provisions of the foregoing statute, to order the active militia to assist civil authorities in the execution of the law as the public interest or safety at any time may require, is as broad and comprehensive as are the needs of the State, and involves necessarily every interest in which the public is concerned.

The public interest of Texas can hardly be more vitally concerned or affected in any one thing than it is in the oil industry. The State of Texas is a

great producer of crude petroleum and natural gas. This industry vitally affects a very large portion of the citizens of Texas in their private interests. The State, as a government, is vitally interested and affected by the oil industry because it derives a very large portion of its revenues from taxation, in various forms, of the oil industry. The State, as a land owner, is vitally interested and affected by the oil industries, because the State of Texas owns large areas of land, or the mineral interest therein, which produce crude petroleum. The public schools and the University of Texas are vitally interested and affected by the oil industry, because the State of Texas as Trustee holds for and on their behalf the legal title to large areas of land, or the mineral interest therein, which produce crude petroleum and natural gas.

Article 5830 of the Texas Statutes declares that the Governor may:

"when an invasion of, or an insurrection in, this State is made or threatened, or when the Governor may deem it necessary for the enforcement of the laws of this State, he shall call forth the active militia or any part thereof, to repel, suppress, or enforce the same, and if the number available is insuffcient, he shall order out such part of the reserve militia as he may deem necessary. . ."

It would be difficult indeed to use language broad-

er or more comprehensive than that used in the foregoing statute.

Article 5778 of the Texas Statutes declares:

"The Governor shall have the power in case of insurrection, invasion, tumult, riot or breach of peace, or imminent danger thereof, to order into active service of this State any part of the militia that he may deem proper. . ."

We find from the foregoing that the Governor of Texas is, by the Constitution itself, made the chief executive officer of the State and commander-in-chief of the military forces of the State, and that in mandatory language he is commanded by the Constitution to cause the laws to be faithfully executed, and in order to do this, he is given the power and authority by the Constitution itself to call forth the militia for several purposes: first, "to execute the laws of the State"; second, "to suppress insurrection"; and third, "to repel invasions and protect the frontier from hostile intrusions by Indians or other predatory bands."

We further find that the Legislature, itself, has in effect defined what constitutes an insurrection. As stated above, Article 5889 declares that the Governor:

"if in his judgment the maintenance of law and order will thereby be promoted, may, by proclamation, declare the county or city in which the troops

are serving, or any special portion thereof, to be in a state of insurrection."

Appellees, who are citizens of the State of Texas, predicated their action in the Federal Court, as against Appellants, upon the proposition that the foregoing provisions of the Constitution of Texas are:

"without effect lawfully to vest such power, authority, or discretion, or to justify such use thereof, and is unconstitutional and void for that same has the effect of and so operates as to deprive plaintiffs and each of them of their liberty, property and rights incident and appertaining thereto, in violationtion of that clause of the 14th Amendment of the Constitution of the United States wherein and whereby a state is inhibited from depriving any person of life, liberty, and property without due process of law, and wherein and whereby a state is inhibited from denying to any person within its jurisdiction the equal protection of the law." (R. 50.)

And, Appellees' action is further predicated upon the further contention:

"And if, as and to the extent that any statute of the State of Texas (particularly Articles 5830, 5831, and/or 5833, Revised Civil Statutes of Texas, 1925) vest or purport to vest in Defendant R. S. Sterling, Governor of Texas, or in any of the other Defendants, any such power, authority or discretion, same

does not lawfully so vest any such power, authority, or discretion, but is unconstitutional, void and without effect to vest or justify the use of any such power authority, or discretion and/or to warrant or justify any act or conduct of the Defendants complained of by plaintiffs because same was and is in violation of Section 24, of Article 1, of the Constitution of Texas. . . of Section 28 of Article 1 of the Constitution of Texas. . . of Section 1, Article 3, and of Section 1 of Article 2 of the Constitution of Texas. . . of Sections 13, 17 and 19, of Article 1 of the Constitution of Texas. . . of that provision of the 14th Amendment of the Constitution of the United States wherein and whereby it is provided 'Nor shall any state deprive any person of life, liberty or property without due process of law'. . . of that provision of the 14th Amendment of the Constitution of the United States wherein and whereby it is provided that no state shall 'deny to any person within its jurisdiction the equal protection of the law'. . . of that provision of Paragraph 1 of Section 10 of Article 1 of the Constitution of the United States wherein and whereby it is provided that 'no State shall . . . pass any . . . laws impairing the obligation of contracts' . . . and of that term of Section 16 of Article 1 of the Constitution of the State of Texas wherein and whereby it is provided that 'no . . . law impairing the obligation of contracts shall be made.' Of those terms of Paragraph 2 of Article 6, and of Sections 1 and 2 and Article 3, of the Constitution of the United States wherein and whereby, respectively, it is provided that the Constitution and laws of the United States made in pursuance of such constitution 'shall be the supreme

law of the land' and that the 'judicial power of the United States shall be vested in one supreme court and in such inferior courts as the Congress may, from time to time, ordain and establish' and that 'the judicial power shall extend to all cases in law and equity arising under' the constitution and laws of the United States and of the statutes of the United States. . ." (R. 50, 51, 42..)

It was Appellees' contention, as we understand their contention:

1. The production of oil is a legal business.
2. That it is lawful for them to produce all the oil their wells are capable of producing so long as there is no physical waste.
3. That no insurrection exists in the Counties of Gregg, Upshur, Rusk and Smith, and that there was and is no necessity for Martial Law therein.
4. That no local officer requested the Governor to send military aid.
5. That the action of the Governor in declaring Martial Law was a mere subterfuge, his real purpose being an economic one, namely, to increase the price of oil.
6. That it is unlawful for the Appellants, during Martial rule, to interfere with the Appellees' lawful conduct of a legal business.

Summarized, the contention of Appellees is that Appellants, in restricting them in the production of crude petroleum, were taking their property without due process of law.

The question presented by the pleadings of the parties is one of law. If the act of Appellants, in restricting production of crude petroleum by Appellees, amounted to a taking of their property without due process of law, then and in that event, the act of Appellants was an unlawful act. If, under the existing emergency created by the insurrection and imminent danger thereof, Appellants could legally restrict the production of crude petroleum by Appellees in order to suppress insurrection or prevent insurrectionary acts, riot, tumult and general disorder, then and in that event the act of Appellants was a lawful act, and it was an abuse of judicial discretion for the lower court to enjoin Appellants.

It is believed that this question has been determined by this court in the case of Moyer vs. Peabody, supra. In that case Mr. Moyer, the Appellant, had a right, a constitutional right, to his liberty, just as Appellees contend they have a right, a constitutional right to produce unlimited quantities of oil. The Governor of Colorado, right or wrong, determined that Mr. Moyer, so long as he was unrestrained of his liberty constituted a menace to the public welfare during the existence of martial rule. This court declared that Mr. Moyer must yield his individual right, his constitutional right, to liberty under the supreme police power of the state.

Moyer contended that he was deprived of his liberty without due process of law, just as Appellees

here contend that they are deprived of their property without due process of law. This court answered this contention of Mr. Moyer in one sentence, and the answer is believed to constitute a complete answer to Appellees' contention, upon which contention they must stand or fall. This court said:

"Public danger warrants the substitution of executive process for judicial process."

This court, in Luther vs. Borden, supra, had before it an action in trespass brought by Luther against Borden and others. The action was grounded on the fact that the defendants had, acting without a warrant, broken into and entered plaintiff's home and endeavored to arrest him. The defendants justified their acts by asserting that a state of insurrection existed, and that martial rule had been declared. Mr. Chief Justice Taney wrote the opinion of the court. He said:

"The remaining question is, whether the defendants, acting under military orders issued under the authority of Government, were justified in breaking and entering the plaintiff's house. In relation to the act of the Legislature declaring Martial Law, it is not necessary in the case before us to inquire to what extent, nor under what circumstances, that power may be exercised by a State. Unquestionably, a military government, established as a permanent government of the State, would not be a re-

publican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the State authorities. And, unquestionably, a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union, as to any other government. The State itself must determine what degree of force the crisis demands. And if the Government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State as to require the use of its military force and the declaration of Martial Law, we see no ground upon which this court can question its authority. It was a state of war, and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that state of things, the officers engaged in its military service might lawfully arrest any one, who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection; and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed. Without the power to do this, Martial Law and the military array of the Government would be a mere parade, and rather encourage attack than repel it. No

more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purpose of opression, or any injury wilfully done to person or property, the party by whom, or by whose order, it is committed, would undoubtedly be answerable."

During Martial Law at Galveston in 1920, Honorable W. P. Hobby, Governor of Texas, suspended from office certain city officials, including the mayor and four city councilmen, the city attorney, the judge of the city court, chief of police, and the chief of detectives. There is no provision in the Constitution or statutes of the State of Texas which expressly authorized the Governor to suspend local officials from office. Governor Hobby acted under the authority of military necessity. A public office is, of course, property. Judge Foster, in United States vs. Wolters, supra, sustained the action of Governor Hobby. Judge Foster said:

"If the civil officers at Galveston were not performing their duties, and not aiding in the enforcement of the law, the Governor would be authorized to suspend them. He did that, and in my opinion the suspension was legal."

In this case, the Appellant, Hon. R. S. Sterling Governor of Texas, believed that the running of Appellees' wells wide open would interfere with his efforts to suppress the existing insurrection, and to

prevent further acts of insurrection, riot, tumult and disorder, limited the production of oil from said wells during the emergency. Appellees were temporarily deprived of the use of their proprty, just as the officials at Galveston were temporarily deprived of the use of their property, and just as Mr. Moyer was temporarily deprived of his liberty. It all comes under the supreme power of the State. There are times when private rights, either of liberty or of property, must yield to public need.

In the opinion of the lower court, it is held that the Governor of Texas has no authority, under the Constitution of the State, to declare Martial Law. In doing this, the lower court expressly overruled the opinion of Judge Rufus Foster in United States vs. Wolters, supra, where Judge Foster had expressly held that the Governor of Texas did have the authority, under the Constitution of the State, to declare Martial Law. In our view of the case, it is immaterial whether the Governor does or does not have the authority to declare Martial Law. The lower court held that the Governor had the right to use state troops to suppress and prevent insurrection, riot, tumult and disorder.

We do not want to be understood as agreeing with the view of the lower court that the Governor of Texas does not have the power under the Constitution of Texas to declare Martial Law. We are emphatically of the opinion that the Constitution

of Texas does vest in the Governor the power to declare Martial Law. The point we desire to make, however, is that whether he has or has not the power to declare Martial Law, he does have the power to use State troops to suppress and prevent insurrection, riot, tumult and disorder. Having this power, —and the lower court holds that he did have this power—the Governor must necessarily determine when the troops shall be used and what steps are necessary to be taken in order to suppress and prevent insurrection, riot, tumult and disorder. The determination of this question by the Governor is necessarily exclusive. There is no court that can substitute its judgment and discretion for that of the Governor, first, as to the necessity of calling out the troops; and second, as to what steps shall be taken in order to make the use of the troops effective.

In Martin vs. Mott, supra, the power of the President to exercise his judgment and discretion was questioned, just as the power of the Governor of Texas to exercise his judgment and discretion is questioned in this case. This court, in an opinion by Mr. Justice Storey, held that neither this court nor any other authority or individual could inquire into the exercise of discretion thus vested in the President. The court said:

"We are all of opinion that the authority to decide whether the exigency has arisen, belongs exclusively

to the President, and that his decision is conclusive upon all other persons."

This court further said:

"He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does so act and decides to call forth the militia his orders for this purpose are in strict conformity with the provisions of the law; and it would seem to follow as a necessary consequence, that every act done by a subordinate officer in obedience to such orders, is equally justifiable."

This court, in Martin vs. Mott, used the following language, which we think is very much in point in this case:

"The law contemplates that under such circumstances, orders shall be given to carry the power into effect."

The Governor of Texas, not only has the power, but it is made his mandatory duty by the Constitution itself to cause the laws to be faithfully executed, and to do this, he is given power to call out the militia. Is this power to be exercised merely that the militia may go upon dress parade? To apply the law, as announced by this court in Martin vs. Mott, it is apparent that the Constitution and laws of Texas contemplate that under such circumstances,

orders shall be given to carry the power thus vested in the Governor into effect. Someone must determine what orders are necessary in order to make this power, thus vested in the Governor, effective. Necessarily, this power is lodged in the Governor. The Governor exercises his discretion and forms a judgment as to what is necessary to be done. No court can, by any possibility of the most vivid imagination, have any power or authority to substitute its judgment for the judgment of the chief executive officer of the State of Texas as to what orders shall be given to make use of the troops effective, the Governor having determined the necessity for using troops.

When that great and courageous President, Grover Cleveland, during the Pullman strike in Chicago, called out the military forces to execute the laws, keep the mails moving and maintain peace, could or would any court have attempted to substitute its judgment for that of the President as to what steps were necessary to suppress the insurrection and outlawry that existed during that strike?

It is believed that the authorities which we are now discussing establish the proposition that the lower court was utterly without jurisdiction to grant the relief prayed for as against Appellants. It may be that this court will not inquire into the question of jurisdiction on this appeal from an order granting an interlocutory injunction. It is believed that

it is proper for the court to do so, because if the court below had no jurisdiction, then it must of necessity follow that there was not only an abuse but a very great abuse of judicial discretion. If the court had no power to act, then its act, in enjoining Appellants, was necessarily an act not sanctioned by law. If the court had no authority to act, then it had no right to exercise any discretion, and any attempt to exercise discretion without authority must necessarily be an abuse of judicial power, which is all that the exercise of judicial discretion is.

The foregoing paragraph is said by way of parenthesis. The authorities which we are now discussing are cited and relied on by Appellants as sustaining their contention that the act enjoined was a lawful act, and that, therefore, the order of the court below in enjoining Appellants was an abuse of judicial discretion, and such an abuse as should be corrected by this court on this appeal from the order granting the interlocutory injunction.

This court, in Stewart vs. Kahn, supra, used the following language:

"The measures to be taken in carrying on war and to suppress insurrection, are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution.

"In the latter case the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to

guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."

In this case it is our earnest contention that the measures to be taken to suppress the insurrection, which the Governor has found to exist in East Texas, and to suppress the imminent danger of further insurrection which he has also found to exist, are not defined either by the Constitution of the Nation or of the State; and that, therefore, as said by this court, the decision as to what measures are to be taken "rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution."

In Keely vs. Sanders, supra, this court used the following language:

"Further than this, whether the military authority had been established throughout Shelby County before the commissioners entered upon the discharge of their duties, is a political question, to be answered by the executive branch of the government and not by the courts."

In Moyer vs. Peabody, supra, this court referring to the Governor said:

"That means that he shall make the ordinary use of the soldiers to that end, that he may kill persons who resist and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such

arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power."

In United States vs. Fischer, supra, the court used the following language:

"The governor may make the ordinary use of soldiers to suppress insurrection and his declaration of the existence of a state of insurrection is conclusive. . .

"When a state of war or insurrection exists, and the Governor has legally called into action the military forces of the state, the will of the commander becomes the controlling authority in the occupied territory, so far as he chooses to exert it, subject to the laws and usages of war. . .

"In cases of military occupancy during war or insurrection, the passing of the military lines by persons without permission, the possession of arms and ammunition, the sale of intoxicating liquors, may cause the commander the loss of a battle, and yet these acts may not offend against the local laws. The usage in time of war has been to make regulations covering offenses in violation of the laws of war or of military discipline."

In United States vs. Wolters, supra, Judge Foster, after declaring that the Governor of Texas had the authority to issue a proclamation declaring Martial Law, used the following language:

"He could do anything necessary to make his proclamation effective."

The court below was apparently of the opinion that injunction was the only remedy whereby the Governor could be prevented from abusing the great power vested in him by the Constitution and statutes of Texas, in regard to the use of troops. There are many remedies to prevent an abuse of the executive power in the use of soldiers. The remedy is not, however, by injunction. We submit that in our investigation of this question, we have found no case where any court, Federal or State, has ever before enjoined the Governor of a State from using troops as he, in his judgment and discretion, determined was necessary and advisable in order to suppress insurrection and danger thereof.

When any Governor of Texas abuses, if such an occasion should ever arise, the power vested in him to use the troops to suppress insurrection and danger thereof, any citizen feeling himself injured by such abuse of power has his remedy in a civil action for damages after the military operations have ceased. If the Governor or any subordinate officer during military operations violates a criminal law of the State or of the Nation, he may be indicted by a Federal or State grand jury and tried for the offense alleged to have been committed. The frequency of elections assures the defeat for reelection of any Governor who abuses the great confidence the people have in the men who are to serve in that capacity. The watchfulness of the State's representatives is a constant safeguard against abuse of

this great, and at the same time necessary, power lodged in the chief executive officer of the State. Under the laws of Texas, the Legislature may convene itself for impeachment purposes. If a tyrant fills the office of chief executive officer of the State of Texas and by his acts and conduct deprives the State of a republican form of government, the power of the Nation may be exercised to carry out the guarantee of the National Constitution that each State shall have and enjoy a republican for mof government.

This court, in Martin vs. Mott, supra, made this statement:

"It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the constitution itself. In a free government the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, of public virtue and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny."

In Mitchell vs. Harmony, supra, this court said:

"There are, without doubt, occasions in which private property may lawfully be taken possession of

or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.

In this same case, this court further said:

"It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.

"In deciding upon this necessity, however, the state of the facts, as they appeared to the officer at the time he acted, must govern the decision; for he must necessarily act upon the information of others as well as his own observation."

Mitchell vs. Harmony was a suit instituted to recover the value of certain property taken by Colonel Mitchell in the province of Chihuahua, during the war with Mexico.

It was a suit, after war had ceased, to recover the value of property taken or injured by the military during the course of the war. Here, as we have hereinabove asserted, is the remedy of Appellees, or anyone else feeling himself aggrrieved by the acts of the Governor or his military officers during the existence of insurrection or imminent danger thereof, which now exists in East Texas.

In the course of its opinion in Mitchell vs. Harmony, this court further said:

"And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it; and the discovery afterwards that it was false or erroneous, will not make him a trespasser."

In the Franks case, supra, the Supreme Court of Kentucky, referring to the Governor, said:

"He is made the sole judge of the necessity that may seem to demand the aid and assistance of the military forces of the state in suppressing disorder and restoring obedience to the law. . . To his good judgment and sound discretion the law has left the final decision as to whether the military arm of the state shall be ordered into active service. If he acts wisely and prudently, well and good. If he acts hastily or unwisely or imprudently, there is no power in the courts to control or restrain his acts. Any attempt on the part of the judicial department of the state so to do would be an interference by one department of the government with the power lodged in another department. . ."

In the Franks case, the court made the further statement:

"The power thus lodged in the Governor is extensive, unrestrained, and subject to abuse. But all

power is subject to abuse. If the fact that power might be abused was sufficient to deny the granting of it, there could be no final authority, and everything must be referred back to the people,—the source of all power. Of course, a system of government that was denied the authority to take final action would be too weak and inefficient to maintain itself or afford due measure of security and protection to the people who created and established it; and in many instances it would entirely fail to accomplish the purpose of its existence."

Continuing, the court said, referring to the Governor:

"For his conduct in ordering out and controlling the movements and operations of the state militia, the governor is answerable only at the bar of public opinion, unless it be that abuses might warrant impeachment proceedings."

We assume that the court in using the foregoing language meant that the Governor officially was answerable only at the bar of public opinion or by impeachment proceedings. It is believed that the authorities are clear that the Governor as an individual is responsible for his acts in using the soldiers both by civil and criminal prosecution, if the facts warrant such action, but this action must be taken, according to the decisions, after and not during the existence of Martial Law.

We next invite the court to consider those author-

ities which it is believed conclusively establish the truth of the proposition that the act of Appellants, in restricting the production of crude petroleum by Appellees, was not a taking of their property in violation of the 14th Amendment to the National Constitution.

It is believed that there is, under the police power, no greater responsibility resting upon a State than the one which requires or should require the State to maintain the majesty of the law, to suppress insurrection, to prevent insurrection, riot, tumult and general disorder. In doing this, it is believed that the State is exercising the supreme police power necessarily inherent in every government in order to preserve its own existence.

In Watson on the Constitution, Vol. 1, page 693, the following language is used:

"A state may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands."

As we understand the above language, it was not intended by the author to convey the thought that the State, through its judiciary department, would

determine what degree of force the crisis demands, but that he who by the Constitution is empowered to exercise military force would make these determinations, and that such determinations must necessarily require the exercise of discretion and judgment, a discretion and judgment which cannot be interferred with by any person or tribunal.

In the case of Marbury vs. Madison, supra, the great Chief Justice said:

"By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.

"In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion."

The Governor of Texas has found as a fact that insurrection, and imminent danger thereof, does exist in the Counties of Gregg, Upshur, Rusk and Smith, in East Texas. This finding of fact by the Governor is conclusive, and cannot be controverted by any evidence.

Insurrection, and imminent danger thereof, being in existence, it is the duty of the Governor, acting for and on behalf of the State of Texas, to suppress such insurrection and to prevent further acts of insurrection, riot, tumult and general disorder. This creates a condition analogous to one of war. The life of the State is imperiled. It becomes the duty of the Governor to take such action as may be necessary in order that the insurrection and the danger thereof may cease to exist. The Governor, and he alone, must determine what action shall be taken. The stock examples of extreme exercise of police power are, that a house, the home of an innocent citizen, may be torn down or blown up to arrest or prevent the spreading of a fire; when the saloon business was a legal business licensed and authorized by the State, the saloons could be closed during riot, insurrection, or imminent danger thereof; private property may be seized and fortified against the approach or threatened approach of a public enemy. Private rights of individuals and corporations, the enjoyment and exercise of which are guaranteed by the Constitution, must in certain exigencies yield to the paramount needs of society, to the public welfare.

In New York vs. Town of Bristol, supra, this court said:

"It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United

States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury."

In Compagnie vs. Louisiana, supra, this court held that the 14th Amendment to the Constitution does not limit the power of the State "to exercise the police power in the preservation of the health, safety and morals of the country by enacting and enforcing quarantine measures, even if in their enforcement it may become necessary to take property, control its use, or restrain people of their liberty."

In Keely vs. Sanders, supra, this court held, in connection with war measures for the collection of taxes by military officers and tribunals, that public danger warrants the substitution of executive process for judicial process. Precisely the same thing was held in the Moyer case, supra.

In Minneapolis vs. Beckwell, supra, this court said:

"It is evident that the Fourteenth Amendment does not limit the subjects in relation to which the police power of the state may be exercised for the protection of the citizen."

In the case of Public Clearing House vs. Coyne, supra, this court declared:

"It is too late to argue that due process of law is denied whenever the disposition of property is affected by the order of an executive department. Many, if not most, of the matters presented to these departments require for their proper solution the judgment or discretion of the head of the department, and in many cases, notably those connected with the disposition of the public lands, the action of the department is accepted as final by the courts, and even when involving questions of law this action is attended by a strong presumption of its correctness."

Continuing, the court said:

"That due process of law does not necessarily require the interference of the judicial power is laid down in many cases and by many eminent writers upon the subject of constitutional limitations."

In the opinion of this court in the Public Clearing House case, the court quoted with approval the language used by Judge Cooley in Weimer vs. Bunbury, 30 Mich. 201, as follows:

"There is nothing in these words (due process of law), however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is

purely executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would not afford redress."

After quoting the above language of Judge Cooley, the opinion of this court continues as follows:

"If the ordinary daily transactions of the departments, which involve an interference with private rights, were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of the government."

In Atlantic Coast Line Ry. Co. vs. Goldsboro, supra, this court used the following language:

"For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

In the case now before the court, the State of Texas, acting through its Governor, by it authorized to determine these matters, is acting for the

safety, good order and general welfare of the community. It will not do to say, that no insurrection existed, hence no necessity for the use of soldiers. The Governor has determined, in the exercise of a discretion and judgment which the people have empowered him to exercise, that insurrection and imminent danger thereof does exist. He has determined that the laws are not being faithfully executed in the Military District, and, in order to cause these laws to be faithfully executed, it is necessary for him to call forth the militia for that purpose; and, he has also determined, in the exercise of his discretion and judgment, that it is necessary for him, in order to maintain the safety, good order and protect the general welfare of the community, to restrict the production of oil from Appellees' wells. Having exercised this judgment and discretion, which the law authorizes and empowers him to exercise, the exercise thereof by the Governor of Texas is a lawful act, and one which could not be enjoined by the court below without an abuse of judicial discretion.

The position here taken does not place the Governor above the law or above the courts. He remains subject to the law and answerable to the courts. He must obey the law and act within the law, and it is supposed, at least, that his official oath and the great powers and public confidence which have been reposed in him will restrain him

from any arbitrary or unlawful act; but, if however, he acts in violation of the law, he is subject to the law and answerable in the courts, that is, he is answerable in the courts of criminal jurisdiction for any violations of the criminal laws of the State or of the United States, he is answerable in damages, after the emergency has passed, at the suit of any injured individual, and he is answerable before a court of impeachment for any arbitrary or unlawful act. This latter court is as much a court as any other court; it is established by the Constitution of the State and is given final and complete authority in all cases within its jurisdiction. Therefore, the construction placed on the Constitution in this argument, and the power asserted to exist in the office of Governor of Texas, does not place him above the law and the courts, but it leaves him subject to both. It does, however, assert that a court of equity may not by injunction control the executive in the exercise of a discretion vested in him by the Constitution. That the people of Texas intended that the Governor should not be subject to the courts in the exercise of executive discretion is illustrated by the fact that the Constitution of Texas provides that the Governor shall not be subject to mandamus. If he were it would nullify the provision of the Constitution dividing the powers of government between the three co-ordinate departments of government.

As best we could, we have covered the points upon

which we rely for reversal of this case. If our contention finds support in the law as it is, we should prevail. If not, we cannot expect to.

The court's careful consideration is invited, and the cause is now respectfully submitted.

DAN MOODY,
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SMITH, BROWNLEE & GOLDSMITH,
Of Counsel.

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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 453.

R. S. STERLING, GOVERNOR OF TEXAS, ET AL., APPELLANTS,

VS.

E. CONSTANTIN, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANTS.

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Of Counsel.

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IN THE

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VS.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANTS.

I.

The opinion of the District Court of the United States for the Eastern District of Texas in this case

was written following the hearing of Appellees' application for an interlocutory injunction and in connection with the order of the Court granting such injunction. The opinion is reported in *Constantin et al. vs. Smith et al.*, 57 Fed. (2d) 227. The opinion also appears on pages 103, et seq., of the Transcript of the Record in *R. S. Sterling, Governor of Texas, et al., vs. E. Constantin et al.*, No. 11, October Term, 1932, being the Transcript of the Record on appeal from the order granting the interlocutory injunction.

II.

JURISDICTION.

Statement.

An appeal was taken from the order granting the interlocutory injunction. This appeal was filed in the Supreme Court of the United States on March 1, 1932, being No. 11, October Term, 1932, *R. S. Sterling, Governor of Texas, et al., appellants, vs. E. Constantin et al, appellees.* On this appeal a statement of the basis on which appellants contend the Supreme Court of the United States has jurisdiction to review on appeal the decree of the District Court of the United States for the Eastern District of Texas granting the interlocutory injunction was filed, as required by paragraph one of Rule 12 of the Supreme Court Rules.

An appeal has been taken from the final order of the District Court of the United States for the Eastern District of Texas in this case granting appellees a permanent injunction. This appeal from the decree granting the permanent injunction is No. 453, October Term 1932, *R. S. Sterling, Governor of Texas, et al., appellants, vs. E. Constantin, et al., appellees,* in the Supreme Court of the United States.

On October 17, 1932, this Court made an order consolidating the appeal from the order granting the interlocutory injunctions, with the appeal from the order granting the permanent injunction, and the consolidated case was set for submission and oral argument on November 14, 1932.

(In referring to the Transcripts of the Records in these appeals—now consolidated—appellants will in this brief, for the assistance of the Court, refer to the Transcript of the Record on the appeal from the temporary order as Transcript of Record, Volume 1; and to the Transcript of the Record from the appeal from the final order as Transcript of Record, Volume 2.)

Statement of Basis on Which Appellants Contend the Supreme Court of the United States Has Jurisdiction to Review on Appeal the Decrees of the United States District Court for the Eastern District of Texas, Granting the Interlocutory and Permanent Injunctions, From Which These Appeals (Now Consolidated) Have Been Taken.

(1)

The statutes believed to sustain appellate jurisdiction are Sections 238 and 266, Judicial Code (28 U. S. C. A., Secs. 345-380).

28 U. S. C. A., Sec. 345 (Sec. 238 Judicial Code) provides:

"A direct review by the Supreme Court of an interlocutory or final judgment or decree of a District Court may be had where it is so provided in * * * Section 380 of this title."

28 U. S. C. A., Sec. 380 (Sec. 266, Judicial Code) provides:

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges,

of whom at least one shall be a justice of the Supreme Court or a circuit judge, * * * An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. * * * and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

(2)

The decree granting the interlocutory injunction, after notice and hearing before a three judge court, organized as provided by Sec. 266 of the Judicial Code (28 U. S. C. A., Sec. 380), was entered on February 26, 1932. (Tr. of R., Vol. 1, p 102.)

The petition for appeal from the decree granting the interlocutory injunction was presented and allowed by the three judges constituting the court on February 26, 1932. (Tr. of R., Vol. 1, p. 396.)

The decree granting the permanent injunction, after notice and hearing before a three judge court, organized as provided by Sec. 266 of the Judicial Code (28 U. S. C. A., Sec. 380), was made on September 19, 1932. (Tr. of R., Vol. 2, p. 7.)

The petition for appeal from the decree granting the permanent injunction was presented and allowed by the three judges constituting the court on September 30, 1932. (Tr. of R., Vol. 2, p. 10.)

(3)

The decree of the Court granting the interlocutory injunction, from which the original appeal was taken, is found on page 102 of the transcript of the record (Vol. 1). The decree of the Court granting the permanent injunction, from which the second appeal was taken is found on page 7 of the Transcript of Record (Vol. 2).

(4)

The amended bill of complaint averred, among other things, that certain oil and gas conservation statutes of the State of Texas, purporting to give authority to the Railroad Commission of the State of Texas, after notice and hearing, to make orders fixing the amount of oil and gas that an operator of an oil and gas well could produce, were invalid because in violation of the Constitution of the United States, and that said orders made by the Railroad Commission, fixing the amount of oil that complainants could produce were likewise in violation of the Constitution of the United States; that a certain conspiracy existed to restrict the production of oil within certain limits; that the appellant R. S. Sterling was a party to such conspiracy; that he had declared "martial law" in the counties of Gregg, Upshur, Rusk and Smith, in the State of Texas; that with the aid and assistance of

appellant W. W. Sterling and appellant Jacob F. Wolters, he was enforcing certain orders made in pursuance of the declaration of "martial law"; that the orders were made and enforced in furtherance of a plan to restrict the production of oil for the purpose of affecting the price; that said orders were void, without justification in law and contrary to the Constitution of Texas and the Constitution of the United States; and that the appellants by the enforcement of such orders were taking the property of appellees in violation of the Fourteenth Amendment to the Constitution of the United States, in this, that by force of arms appellees were compelled to restrict the production of oil from each of the wells of appellees to one hundred (100) barrels of oil per day, when each of said wells was capable of producing, without physical waste, five thousand (5,000) barrels of oil per day. The appellees prayed for temporary and permanent injunctions. Appellees pleaded that the statutes of Texas, which appellants assert gave them power and made it their duty under existing conditions to use military force to suppress riot or insurrection and preserve peace, and which appellants averred they were acting under and enforcing in the use of military force, were, together with the military orders and the acts performed under them, in contravention of the Fourteenth Amendment to the Constitution of the United States. The appellees' pleading, as ap-

pellants construe it, is to the further effect that these statutes as construed and enforced by appellants, and the orders issued under them, are likewise in violation of the Fourteenth Amendment to the Constitution of the United States. (Tr. of R., pp. 48, 50, 54.)

Appellees' amended bill of complaint is found in the Transcript of the Record, Vol. 1, pages 19-48; their supplemental bill, in Vol. 1, pages 49-55.

Appellants answered and pleaded that "martial law" had been proclaimed by appellant R. S. Sterling under authority of the Constitution and laws of the State of Texas, to prevent riot and insurrection, or threatened riot and insurrection; that "martial law" was the means necessary to accomplish the suppression of riot and insurrection, or threatened riot and insurrection, and that such declaration and the orders so enforced were issued under constitutional and statutory authority and in the lawful discharge of duties imposed by law on the Governor. Appellees contended that appellants' acts were a violation of their constitutional rights under the Constitution of the United States. The answer of appellants to appellees' first amended bill of complaint is found in the Transcript of the Record, Vol. 1, pages 55-96.

The order granting the interlocutory injunction enjoined appellants "and all other persons acting for or with, or under the direction of them" from "enforcing against complainants any of their so-

called military or executive orders, passed or to be passed, regulating or restricting the production of oil from complainants' wells, or from in any manner, directly or indirectly, interfering with the lawful production of oil from complainants' property". (Tr. of R., Vol. 1, p. 102.)

The decree of the court granting the permanent injunction permanently enjoined appellants "and all other persons acting for or with, or under the direction of them" from "enforcing against complainants any of their so-called military or executive orders, passed or to be passed, regulating or restricting the production of oil from the oil wells of complainants, described in their bill of complaint, or from in any manner, directly or indirectly, interfering with the lawful production of oil from complainants' said oil wells." (Tr. of R., Vol. 2, p. 7.)

(5)

The cases relied upon to sustain the jurisdiction of the Supreme Court of the United States are:

Clark vs. Poor, 274 U. S. 554;
Mathews vs. Rodgers, 52 S. C. Rep. 217, 76 L. ed. 271;
Interstate Busses Corp. vs. Blodgett, 276 U. S. 245;
Van Dyke vs. Geary, 244 U. S. 39;
Railroad Co. vs. Garrett, 231 U. S. 298;
Alabama vs. United States, 279 U. S. 229;

Natural Fuel & Gas Co. vs. Public Service Commission, 278 U. S. 322;

National Fire Ins. Co. vs. Thompson, 281 U. S. 331; and

Herkness vs. Irion, 278 U. S. 92.

III.

STATEMENT OF THE CASE.

Appellant R. S. Sterling, Governor of Texas, issued an executive proclamation on August 16, 1931, proclaiming a state of insurrection, tumult, riot and breach of the peace, and imminent danger of insurrection, tumult, riot and breach of the peace, to exist in Gregg, Upshur, Rusk and Smith Counties, Texas. It was stated in the proclamation that "there is now imminent danger of said insurrection, tumult, riot and breach of the peace threatening serious danger to citizens and their property, being extended not only in the territory heretofore described, but in other areas of this State where oil and natural gas are being produced by operators who are obeying the laws relating to the conservation of crude petroleum oil and natural gas". (Tr. of R., Vol. 1, p. 92.)

The proclamation directed that the appellant "Jacob F. Wolters assume supreme command of the situation in the territory affected and without delay shut down each and every producing crude oil well and/or producing well of natural gas, and to

further take such steps as he may deem necessary to enforce and uphold the majesty of the law, subject to the orders of the Governor of Texas" * * *. (Tr. of R., Vol. 1, p. 93.)

The Railroad Commission of Texas, vested with authority to enforce the conservation laws of the State in regard to the production of oil, made and caused to be entered on September 2, 1931, an order fixing the amount of oil that could be produced from any producing oil well in either Gregg, Upshur, Rusk or Smith Counties, Texas, at two hundred twenty-five (225) barrels per day. The appellant R. S. Sterling then issued a proclamation permitting the wells to be opened and to produce at the rate fixed by the order of the Railroad Commission of Texas. (Tr. of R., Vol. 1, pp. 34, 78.)

Another order was made and promulgated by the Railroad Commission of Texas on September 18, 1931, restricting the production of oil from wells in the counties named to one hundred eighty-five (185) barrels per well per day; and on October 10, 1931, another order was entered by the Railroad Commission of Texas, further reducing the daily well allowable of crude oil to one hundred sixty-five (165) barrels. These orders each expired under their terms on October 31, 1931. In each instance the appellant R. S. Sterling directed his officers in the area in which "martial law" had been declared to enforce these orders of the Railroad Commission of

Texas. (Tr. of R., Vol. 1, pp. 38, 39, 78, 97, 98, 99.)

On October 29, 1931, the appellant R. S. Sterling issued an order directing the appellant Wolters, the officer he had placed in charge of the territory affected by "martial law," to limit the production from wells in that area to one hundred fifty (150) barrels of oil per well per day. In this order or proclamation it was stated:

"Whereas I have received advice and information believed by me to be reliable and true, to the effect that there is much dissatisfaction among land owners and small operators because of the foregoing conditions, and that if such conditions are permitted to continue the result will be acts of violence, breach of peace, disorder, possible destruction of property, and serious interference with the suppression of insurrection, to suppress which Martial Law was declared in said counties, effective August 17, 1931, and which is now and has at all times since said date been in full force and effect; and,

"Whereas I believe that it is necessary, as a precaution against acts of insurrection, riot, breach of peace, tumult and general disorder, of which there is imminent danger in the aforesaid counties, and that it is a proper measure and the only means at my command to suppress the existing insurrection in said counties and prevent further acts of insurrection, riot, tumult, breach of peace and general disorder in said counties, and to remove the existing

imminent danger of such unlawful acts in said counties, for me to cause oil production from each oil well in said counties to be limited and restricted for the present to 150 barrels of oil per day;" * * *. (Tr. of R., Vol. 1, p. 94.)

On November 6, 1931, appellant R. S. Sterling issued an order to the appellant Wolters to restrict the production of oil from wells in the area affected by the proclamation of "martial law" to one hundred twenty-five (125) barrels per well per day. And, on December 10, 1931, he issued another order further reducing said production to one hundred (100) barrels of oil per well per day. (Tr. of R., Vol. 1, pp. 95, 96.)

Appellees' amended pleadings averred, among other things, that the statutes of the State of Texas, by authority of which the Railroad Commission of Texas acted in making the orders fixing the amount of oil that an operator could produce from his wells, were invalid because the same contravened the Constitution of the United States and that the orders made under the statutes by the Railroad Commission of Texas were violative of the Constitution of the United States (Tr. of R., Vol. 1, p. 31); that there existed a conspiracy to restrict the production of oil, with the view of affecting the market or sale price of the commodity; that the appellant R. S. Sterling and the members of the Railroad Commission of Texas were parties to the said conspiracy

(Tr. of R., Vol. 1, pp. 28, 36, 38); that the appellant R. S. Sterling had by proclamation declared "martial law" and with the aid and assistance of the appellants W. W. Sterling and Jacob F. Wolters were taking the property of appellees without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States; that the statutes of the State of Texas, under which the appellant R. S. Sterling purported to act in issuing the proclamation of "martial law" and under which he issued said orders and used military force to suppress the declared insurrection and danger of insurrection and to restore the peace, were in violation of the Constitution of the United States. (Tr. of R., Vol. 1, pp. 48, 49-54.)

The answer of the Railroad Commission of Texas, among other things, alleged that the orders of the Railroad Commission of Texas, which were sought to be enjoined, had by their own terms expired on August 31, 1931, and that the Railroad Commission of Texas was not at the time of the filing of the answer attempting or threatening to enforce any of such orders. (Tr. of R., Vol. 1, p. 99.) No interlocutory injunction was issued as against the Railroad Commission of Texas. (Tr. of R., Vol. 1, p. 102.)

Appellants answered, among other things, that the various orders and proclamations above mentioned had been issued; that the appellant R. S.

Sterling as chief civil magistrate and Commander-in-Chief of the military forces of the State of Texas was charged by the Constitution and laws of Texas with the duty of causing the laws to be faithfully executed and that for such purpose he was authorized by the Constitution and laws of the State to employ its military forces; that for the purpose of suppressing "the then existing state of insurrection, tumult, riot, and breach of peace, and preventing insurrection, riot, tumult, and breach of peace, which were imminent in Gregg, Upsur, Rusk and Smith Counties, Texas", he issued the proclamation declaring "martial law" in said counties under the authority granted him by the Constitution and statutes of Texas and in obedience to the duty imposed upon him by these laws; that the various proclamations and orders issued by the appellant R. S. Sterling and executed by the other appellants were issued and executed under such proclamation declaring "martial law" and for the purpose of restoring the peace and suppressing insurrection or riot or the imminent danger thereof. (Tr. of R., Vol. 1, pp. 76-90.)

Appellees' application for an interlocutory injunction was heard in Houston, Texas, on January 4, 1932, before a three judge court, organized as provided by Sec. 266 of the Judicial Code, and thereafter, on February 26, 1932, said court granted an interlocutory injunction restraining the appellants

in the manner and to the extent previously pointed out. (Tr. of R., Vol. 1, p. 120.)

The case was submitted on its merits and for final decree at Houston, Texas, on May 30, 1932, before a three judge court, organized as provided by Sec. 266, of the Judicial Code, and composed of the same members as the court which had heard appellees' application for an interlocutory injunction. (Tr. of R., Vol. 1, p. 102; Tr. of R., Vol. 2, p. 1). It was submitted under the terms of a stipulation between appellants and appellees to the effect that:

(1) There should be a severance of the appellees' cause of action as between appellees and appellants, and as between appellees and the other parties named in appellees' bill of complaint; that the suit should proceed to trial and final judgment on existing pleadings as between appellees and these appellants as though no other parties were named in the pleadings; that the suit as between appellants and appellees should be treated as a separate suit from the suit of appellees against all other persons named as defendants in appellees' bill of complaint, the same as though it had been separately filed against the other defendants; that separate final judgments should be entered as between appellees and the appellants and as between appellees and other defendants named in appellees' bill; and, that the respective parties to the separate judgments might appeal

separately from the respective judgments when entered.

(2) That the suit as between appellants and appellees was submitted to the court to be decided on its merits on existing pleadings and on the record of evidence introduced at the trial upon the application for an interlocutory injunction; that the court should enter final judgment as between appellants and appellees; and, that either appellees or appellants might prosecute an appeal from said judgment the same as though they were the only parties named in appellees' bill.

(3) That in any appeal from final judgment as between appellants and appellees, either or any of them might use the transcript of the record in the appeal from the decree granting the interlocutory injunction as the record on appeal from the final order entered as between appellants and appellees; that any party or parties appealing from such final order might, in addition to the record in the appeal from the decree granting the interlocutory injunction, take up as additional parts of the record the stipulation, the final judgment of the court, and such bonds and other parts of the record as the appealing party might desire; and, that the record on file in the appeal from the order granting the interlocutory injunction was a true and correct Transcript of the Record on appeal from the order granting the interlocutory injunction.

(4) That the appeal from the final order should be consolidated in the Supreme Court of the United States with the appeal taken from the decree granting the interlocutory injunction.

This stipulation was signed by the attorneys for all parties to the suit, and approved by each of the judges of the court, and filed with the clerk. (Tr. of R., Vol. 2, p. 1.)

The final decree of the three judge court was made in this case on September 19, 1932, granting a permanent injunction to appellees against appellants to the effect previously stated. (Tr. of R., Vol. 2, p. 7.)

In connection with the appeal from the decree granting the permanent injunction, it was stipulated, with the approval of the court:

(1) That the printed transcript of the record in the appeal from the interlocutory injunction contains a true and correct statement of all substantial and material evidence given on the hearing at the time the case was tried on its merits.

(2) That "the transcript of the record of all pleadings and the evidence now on file in the Supreme Court of the United States on the appeal of the Defendants herein from the interlocutory injunction heretofore granted shall be and does constitute a full and complete record and transcript of all proceedings had, including pleadings and evi-

dence, before the three-judge court at the time this cause was tried on its merits".

(3) That it shall not be necessary in perfecting an appeal from the decree granting the permanent injunction to bring forward and file a transcript of the pleadings and evidence upon which this case was tried for the reason that it is now on file in the appeal from the order granting the interlocutory injunction. (Tr. of R., Vol. 2, pp. 4.)

IV.

SPECIFICATIONS OF ERRORS.

Statement.

The errors assigned in the appeal from the decree granting the interlocutory order have been specified and briefed in connection with that appeal and the appellants will here specify the errors assigned to the decree of the court granting the permanent injunction.

1.

The court erred in finding that the defendant and appellant R. S. Sterling, as Governor of the State of Texas, had no authority under the Constitution and laws of the State of Texas to declare martial law. (Appellants' 6th Assignment of Error, Tr. of R., Vol. 2, p. 12.)

2.

The court erred in finding that it had jurisdiction to inquire into and determine whether, as a matter of fact, an insurrection or riot, or imminent danger thereof, existed in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, at a time when the Governor of Texas, in the exercise of his discretion and judgment, had determined that an insurrection and riot, or imminent danger thereof, did exist, and had by proclamation declared martial law, which was in force and effect at the time of the hearing and decision of this case, and which was declared for the purpose of suppressing and preventing insurrection and riot in said Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas. (Appellants' 2nd Assignment of Error, Tr. of R., Vol. 2, p. 11.)

3.

The court erred in holding that it had jurisdiction to review, inquire into, and control by injunction the means employed by the defendant and appellant, R. S. Sterling as Governor of Texas, under martial law, to suppress the insurrection and riot, and imminent danger thereof, found and declared by him to exist in his proclamation declaring martial law, in the Counties of Gregg, Ppshur, Rusk and Smith, in the State of Texas, and in substituting its

judgment and discretion for that of the Governor of Texas in determining the means to be employed under martial law to suppress the riot and insurrection, and imminent danger thereof, found to exist in the proclamation declaring martial law. (Appellants' 11th Assignment of Error, Tr. of R., Vol. 2, p. 13.)

4.

The court erred in finding that it had jurisdiction to hear, determine and grant the injunction against these defendants, the Governor of Texas, the Commanding Officer of the military forces of the State of Texas, and the Adjutant General of the State of Texas. (Appellants' 1st Assignment of Error, Tr. of R., Vol. 2, p. 11.)

5.

The court erred in finding that the restriction placed by the Governor upon the production of crude petroleum by the plaintiffs, during the existence of martial law under the Constitution and stautes of Texas, as a means of preventing and suppressing insurrection and riot, or imminent danger thereof, was a taking of the plaintiffs' property or a trespass upon the property rights of the plaintiffs, in violation of the Fourteenth Amendment to the Constitution of the United States. (Appellants' 7th Assignment of Error, Tr. of R., Vol. 2, p. 12.)

6.

The court erred in granting the injunction against these defendants and appellants, enjoining them, and each of them, in their official capacity, from interfering with the production of oil by plaintiffs from land situated in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, at a time when, according to the judgment and discreton exercised by the defendant and appellant, R. S. Sterling as Governor of the State of Texas, there was insurrection, riot and tumult, and imminent danger thereof, in said counties, and at a time when by proclamation of the Governor martial law was being maintained and enforced in said counties. (Appellants' 9th Assignment of Error, Tr. of R., Vol. 2, p. 13.)

7.

The court erred in granting the injunction as against these defendants and appellants, and as against each of them, because the judgment, order or decree of the court, granting such permanent injunction, is without support, either in the facts or by the law of this case. (Appellants' 10th Assignment of Error, Tr. of R., Vol. 2, p. 13.)

8.

The court erred in finding that the evidence showed no insurrection or riot existed in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, on August 16, 1931, or on October 13, 1931, or at the time this cause was heard and decided by this court. (Appellants' 3rd Assignment of Error, Tr. of R., Vol. 2, p. 12.)

9.

The court erred in finding that there was no warrant in the evidence for the belief, on the part of the defendants and appellants R. S. Sterling and Jacob F. Wolters that there was imminent danger of insurrection or riot in the Counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, on August 16, 1931, or on October 13, 1931, or at the time this case was heard and decided by this court. (Appellants' 4th Assignment of Error, Tr. of R., Vol. 2, p. 12.)

10.

The court erred in finding that the defendant and appellant R. S. Sterling, as Governor of Texas, had ousted the Railroad Commission of the State of Texas from the exercise of its jurisdiction in the matter of enforcing the conservation laws of the

State of Texas, as applied to the production of crude petroleum. (Appellants' 5th Assignment of Error, Tr. of R., Vol. 2, p. 12.)

V.

SUMMARY OF ARGUMENT.

Point A. The Constitution and statutes of Texas authorize the Governor and vest in him discretion to declare a state of insurrection to exist in a defined area of the State and to employ the military forces of the State to suppress insurrection, tumult, riot or breach of the peace and to repel invasion. The authority, power and discretion vested in the Governor by these provisions of the Constitution and statutes are sufficient to authorize and empower him, when in his judgment and discretion it appears necessary to the discharge of his duties in preserving the peace, in protecting life and property and in causing the laws to be executed, to declare "martial law" as that term is understood and the acts which may be done under its declaration are declared in the jurisprudence of this country. The proclamation of August 16, 1931, was effective to declare "martial law" in Gregg, Upshur, Rusk and Smith Counties, Texas.

Point B. When the Governor of Texas, in the exercise of his discretion, determines that a state of insurrection exists, or that there is imminent

danger thereof, in a defined area and exercises the power of the office to proclaim the existence of such insurrection, or the imminent danger thereof, and calls the military forces into active service and directs such forces to suppress the declared insurrection, or imminent danger thereof, his declaration of the existence of the insurrection, or the danger thereof, is conclusive upon the courts during the period of the declared emergency and they may not on an injunction proceeding inquire into either the sufficiency of the facts to sustain the declaration or the motive of the Governor in making it. These powers are vested in the Governor exclusively by the Constitution and statutes of the State.

Point C. When the Governor of Texas issues his proclamation declaring a state of insurrection, riot, tumult and breach of the peace, or imminent danger thereof, to exist in a defined area and as Commander-in-Chief of the military forces of the State calls them into active service to suppress such conditions, he may make the ordinary use of the soldiers and direct them to do whatever appears to him to be reasonably necessary at the time to suppress the insurrection and restore the peace; and the courts may not, during the period of the declared emergency, by writ of injunction, control the details of the Governor's exercise of this power of government or the details of his use of the soldiers; under such circumstances the courts cannot by injunction sub-

stitute their judgment and discretion for that of the Governor in determining the means to be employed in suppressing or averting the existing or impending riot and insurrection.

Point D. The State, acting through the Governor, may take private property located in the area in which insurrection, riot, tumult and breach of the peace, or imminent danger thereof, have been declared by proclamation to exist. The decision of the Governor that the taking of private property is necessary to prevent the impending insurrection, riot, tumult and breach of the peace, or to suppress the existing insurrection, riot, tumult and breach of the peace, is conclusive, and a taking under such circumstances is with due process of law.

VI.

ARGUMENT.

Point A.

The Constitution and statutes of Texas authorize the Governor and vest in him discretion to declare a state of insurrection to exist in a defined area of the State and to employ the military forces of the State to suppress insurrection, tumult, riot or breach of the peace and to repel invasion. The authority, power and discretion vested in the Governor by these provisions of the Constitution

and statutes are sufficient to authorize and empower him, when in his judgment and discretion it appears necessary to the discharge of his duties in preserving the peace, in protecting life and property and in causing the laws to be executed, to declare "martial law" as that term is understood and the acts which may be done under its declaration are declared in the jurisprudence of this country. The proclamation of August 16, 1931, was effective to declare "martial law" in Gregg, Upshur, Rusk and Smith Counties, Texas.

Appellants desire that there be no misapprehension upon the part of the Court as to their meaning in the use of the term "martial law" where it appears in this brief and argument.

In the course of his dissenting opinion in *Ex Parte Milligan*, 4 Wall. 2 (exact page 142), Chief Justice Chase said:

"There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within States or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of States maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction

under military law, and is found in Acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as military government, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander, under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated martial law proper, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights."

In using the term "martial law" appellants refer to the third kind of military jurisdiction spoken of in the above quotation: that is, "martial law" "called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights". Except, of course, appellants refer to "martial law" as called into action by the Chief Executive of a State and not as called into action by Congress or The President.

The provisions of the Constitution and statutes of Texas, upon which appellants rely for authority of the Governor to proclaim "martial law" in a defined area, are:

Constitution of Texas: Art. IV, Sec. 1. "The Executive Department of the State shall consist of a Governor, who shall be the Chief Executive Officer of the State," * * *

Art. IV, Sec. 7. "He (the Governor) shall be Commander-in-Chief of the military forces of the State, except when they are called into actual service of the United States. He shall have power to call forth the militia to execute the laws of the State, to suppress insurrections, repel invasions, and protect the frontier from hostile incursions by Indians or other predatory bands."

Art. IV, Sec. 10. "He (the Governor) shall cause the laws to be faithfully executed" * * *.

Statutes of Texas: Art. 5778, Revised Civil Statutes, 1925. "The Governor shall have power in the case of insurrection, invasion, tumult, riot or breach of peace, or imminent danger thereof, to order into the active service of this State any part of the militia that he may deem proper." * * *

Art. 5830, Revised Civil Statutes, 1925. "When an invasion of, or an insurrection in, this State is made or threatened, or when the Governor may deem it necessary for the enforcement of the laws of this State, he shall call forth the active militia or any part thereof to repel, suppress, or enforce the same, and if the number available is insufficient he

shall order out such part of the reserve militia as he may deem necessary."

Art. 5834, Revised Civil Statutes, 1925. "The Governor may order the active militia, or any part thereof, to assist the civil authorities in guarding the prisoners, or in conveying prisoners from and to any point in this State, or discharging other duties in connection with the execution of the law as the public interest or safety at any time may require."

Art. 5889, Revised Civil Statutes, 1925. "Whenever any portion of the military forces of this State is employed in aid of the civil authority, the Governor, if in his judgment the maintenance of law and order will thereby be promoted, may, by proclamation, declare the county or city in which the troops are serving, or any special portion thereof, to be in a state of insurrection."

The appellants rely upon the proclamation of the Governor issued on August 16, 1931, as being effective to proclaim and establish "martial law" in the area in which appellees' property was located.

The following are pertinent parts of this proclamation:

"Whereas from facts presented to me by many responsible citizens including resolutions adopted at a meeting of producers and royalty owners of East Texas oil field on August 14, 1931, and representations made by a committee of citizens who called upon me and submitted facts as to the conditions that obtained in said East Texas oil field, *it is evident that:*

"There exists an organized and entrenched group of crude petroleum oil and natural gas producers in said East Texas oil field, covering areas within the counties of Upshur, Rusk, Gregg and Smith who are in a state of insurrection against the conservation laws of the State relating to the prevention of waste of crude petroleum oil and natural gas, and are in open rebellion against the efforts of the constituted civil authorities of this State to enforce such laws; and that

"As evidenced by a telegram in my hand from the Sheriff of Rusk County the sheriffs of the counties in the district defined have not a sufficient force, and under the very nature of our government could not have a sufficient force to compel operators and producers of crude petroleum oil and natural gas to obey said law, it being utterly impossible with the forces at the command of the sheriffs or other civil authorities to enforce either the orders of the Railroad Commission of Texas or the laws pertaining to the waste of crude petroleum oil or natural gas against an entrenched group of insurrectionists such as are violating the law in the territory defined; and that

"The first called session of the Forty-second Legislature enacted a new conservation law amending existing statutes; and in order to give the Railroad Commission of Texas sufficient time to have hearings and promulgate proper orders providing for the conservation of crude petroleum oil and natural gas in the district above defined during which time without the presence of protecting authority the crude petroleum oil and natural gas in said district are being unlawfully dissipated and wasted and *the*

land owners and royalty owners being robbed of their royalties by unscrupulous and lawless producers, transporters and operators; and that

"By reason of the reckless, unlawful and criminal handling of producing wells in said district water is being rapidly drawn into the oil sands, thereby creating enormous physical waste of crude petroleum oil, and more than 1,000,000,000 cubic feet of natural gas, rich in gasoline content, are being wasted, all of which causes a great loss of revenue to this State, and does, and will, affect the welfare of our educational institutions, including our common schools, eleemosynary institutions, and each and every state department of the State Government and will increase the burdens of taxation upon our people generally; and that

"*The existing condition has brought about a state of public feeling on the part of citizens, that if the State Government cannot or fails to protect the public interest and the interest of the land and royalty owners they will attempt to take the law into their own hands, and by force of arms shut down the producing oil wells in said defined district until the State can and will enforce the conservation laws;* and that

"In at least one instance, as reported to me, an oil company operating in said defined district has ordered representatives of the Oil and Gas Division of the Railroad Commission of Texas who were performing their lawful and official duties from their leases; and

"Whereas *this condition has caused threats of acts of violence on the part of indignant responsible citizens against those who openly, flagrantly and*

rebelliously violate the laws and defy the constitutional civil authorities of this State; and

"Whereas *a state of insurrection, tumult, riot and breach of the peace does exist in the defined area;* and

"Whereas *in addition to the insurrection, tumult, riot, and breach of the peace that does now exist in the said defined area, there is now imminent danger of said insurrection, tumult, riot and breach of the peace threatening serious danger to citizens and their property being extended not only in the territory heretofore described, but in other areas of this State where oil and natural gas is being produced by operators who are obeying the laws relating to the conservation of crude petroleum oil and natural gas;* and"

* * *

"*Now, therefore, I, R. S. Sterling, Governor of the State of Texas*" * * * "*declare that the conditions above described do exist and are clearly violative of the Constitution and laws of this State*", * * *

"*And I do hereby declare Martial Law in said territory,*" * * *. (Tr. of R., Vol. 1, pp. 90-93.) *(Italics ours.)*

Chief Justice Chase said in *Ex Parte Milligan supra*, that the third kind of military jurisdiction of which he spoke might "be denominated martial law proper, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or

invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights." This indicates that Chief Justice Chase thought that "martial law" could be called into action by Congress or that it could be called into action under certain circumstances by The President. Where is Congress and where is The President to find authority for invoking "martial law" within districts or localities where ordinary law no longer adequately secures public safety and private rights"?

Article I, Sec. 8 of the Constitution of the United States provides:

"The Congress shall have power: * * * * to provide for calling forth the militia to execute the laws of the Union, suppress insurrection and repel invasions."

Article II, Sec. 2 of the Constitution of the United States provides:

"The President shall be Commander-in-Chief of the Army and Navy of the United States and of the militia of the several states when called into actual service of the United States."

The Act of February 28, 1795, provided that:

"In case of an insurrection in any state against the government thereof, it shall be lawful for The

President of the United States on application of the Legislature of such state or of the Executive (when the Legislature cannot be convened) to call forth such number of the militia of any other state, or states, as may be applied for as he may judge sufficient to suppress such insurrection."

It was further provided by Congress in 1795:

"'That whenever the United States shall be invaded, or be in imminent danger of invasion, from any foreign nation or Indian tribe, it shall be lawful for the president to call forth such number of the militia of the state or states most convenient to the place of danger, or scene of action, as he may judge necessary, to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper,' and like provisions are made for the other cases stated in the constitution." *(Story on the Constitution*, Vol. 2, p. 109, Second Edition, 1851.)

Evidently Chief Justice Chase, in speaking of "martial law" called into action by The President, had in mind these provisions of the Constitution and acts of Congress.

One does not find the words "martial law" used in either of the provisions above quoted, but nevertheless it is through and under them that provision is made for authority to suppress insurrection and repel invasion through the use of military force.

Executive and departmental constructions are valuable as persuasive authority in some jurisdictions, and they are given this force because it is supposed that public officers will not attempt to disobey the law, but rather that they will endeavor to honestly and properly construe it and faithfully obey it. Especially is it to be supposed that a President of the United States will use extreme care to stay within the limitations imposed by law upon the powers of office. It is because of this presumption or supposition that the act of President Cleveland in using soldiers in Chicago and the threat of President Theodore Roosevelt to use them during the coal strikes in Pennsylvania are of value as authority that The President of the United States may call into action "martial law." These men evidently believed this power existed in the office of President and their belief must have been induced by these constitutional and statutory provisions that do not use the term "martial law."

A comparison of these provisions of the Constitution of the United States and of the act of Congress with the provisions of the Constitution and the acts of the Legislature of Texas is most respectfully invited.

The President of the United States is made Commander-in-Chief of the militia. Congress is given power to provide for calling forth the militia to execute the laws, suppress insurrections and repel in-

vasions. Congress has enacted statutes authorizing the President of the United States to use the militia to repel invasions, suppress rebellions and insurrections and to enable him to execute the laws. The Governor of Texas is made the Commander-in-Chief of the military forces of the state; he is directed to cause the laws to be faithfully executed, and is given power to call forth the militia to execute the laws of the state, to suppress insurrections and repel invasions. The statutes provide that he may by proclamation declare the existence of a state of insurrection.

If the above quoted provisions of the Constitution of the United States and the acts of Congress are effective to vest in the President of the United States the power to declare "martial law," and evidently Chief Justice Chase so construed them, then it would logically follow that analogous provisions in the Constitution and statutes of Texas confer a similar power upon the Governor of the State of Texas.

Incidents recorded in history of the misuse of power under "martial law" and an anticipation that history may repeat itself in this respect have caused some to deny that the executive has the power to declare "martial law," but their denials must find support in the fears which they express rather than in the laws of the land. The statement that a power may be abused does not argue against its existence,

and if it did, the argument would be equally effective to deny the existence of power in any officer or body of officers, and its logical end would be society reduced to its original elements with every man his own ruler and monarch. It begs the question to say that the government is without power to meet and suppress insurrections or other lawlessness with a superior force because the power might be abused, or that soldiers may not be called into action by the executive if the emergency is deemed by him to justify that end because such authority might be misused. It denies to the government the power to protect its citizens and continue its existence in the face of revolt, to say that its founders entertained such fear of the misuse of power that they withheld from the government authority to use adequate force at the call of the executive to maintain the peace and preserve life and property.

While the power is necessarily an overriding one, since its use is intended to be exercised in times of peril for the preservation of the government, the enormity of the power or the danger of its abuse do not argue against its existence. Mr. Justice Story aptly stated in *Martin vs. Mott*, 12 Wheat. 19, that:

"It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government the

danger must be remote since in addition to the high qualities which the executive must be presumed to possess of public virtue and honest devotion to the public interests, the frequency of elections and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny."

What was said by Chief Justice Taney in *Luther vs. Borden,* 7 How. 1, effectively disposes of any suggestion that the power may be abused. The reasons he stated for this power and responsibility being reposed in the President apply with equal force to the Governor of Texas.

"It is said that this power in the President is dangerous to liberty and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe and at the same time equally effectual. When citizens of the same state are in arms against each other and the constituted authorities unable to execute the laws the interposition of the United States must be prompt or it is of little value; the ordinary course of proceedings in courts of justice would be utterly unfit for the crisis; and the office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a willful abuse of power as human prudence and foresight could well provide."

The case of *In re Moyer*, 35 Colo. 159, 85 Pac. 190, 12 L. R. A. (NS) 979, is an authority of force to sustain appellants' position that the Constitution and statutes of Texas empower the Governor of Texas to proclaim "martial law." In connection with the holding of the court in this case that the Governor of the State of Colorado had the right, under the Constitution and laws of that state, to call out troops and restrain Moyer of his liberty, appellants invite a comparison of the pertinent provisions of the Constitution of Texas with those of the Constitution of Colorado and of the pertinent statutes of this state with those of Colorado.

CONSTITUTION OF TEXAS.	CONSTITUTION OF COLORADO.
Art. IV, Sec. 1. "The Executive Department of the State shall consist of a Governor, who shall be the Chief Executive officer of the State," * * * *.	Art. IV, Sec. 2. "The supreme executive power of the State shall be vested in the governor, who shall take care that the laws be faithfully executed."
Art. IV, Sec. 7. "He (the Governor) shall be Commander-in-Chief of the military forces of the State, except when they are called into actual service of the United	Art. IV, Sec. 4. "The Governor shall be Commander-in-Chief of the military forces of the State, except when they shall be called into actual service of the United

States. He shall have power to call forth the militia to execute the laws of the State, to suppress insurrections, repel invasions, and protect the frontier from hostile incursions by Indians or other predatory bands."

Art. IV, Sec. 10. "He (the Governor) shall cause the laws to be faithfully executed," * *.

STATUTES OF TEXAS.

Art. 5778, Revised Civil Statutes, 1925. "The Governor shall have power in the case of insurrection, invasion, tumult, riot or breach of peace, or imminent danger thereof, to order into the active service of this State any part of the militia that he may deem proper." * * * *

Art. 5830, Revised Civil

States. He shall have power to call out the militia to execute the laws, suppress insurrection or repel invasion."

STATUTE OF COLORADO

Laws 1897, page 204, Sec. 2 (Sec. 4424, Revised Statutes, 1908). "When an invasion of or an insurrection in the state is made or threatened the Governor shall order the National Guard to repel or suppress the same; *provided*, That when the emergency is great and time will not admit of communication with the Governor, the command-

Statutes, 1925. "When an invasion of, or an insurrection in, this State is made or threatened, or when the Governor may deem it necessary for the enforcement of the laws of this State, he shall call forth the active militia or any part thereof, to repel, suppress, or enforce the same, and if the number available is insufficient he shall order out such part of the reserve militia as he may deem necessary."

Art. 5834, Revised Civil Statutes, 1925. "The Governor may order the active militia, or any part thereof, to assist the civil authorities in guarding prisoners, or in conveying prisoners from and to any point in this State, or discharging other duties in connection with the execution of the law as the public interest or safety at any time may require."

ing officer of any portion of the National Guard stationed at the scene of trouble may assemble his command and after taking steps to notify the Governor in the most speedy manner possible, aid the civil officers in repelling invasion or suppressing insurrection."

Art. 5889, Revised Civil Statutes, 1925. "Whenever any portion of the military forces of this State is employed in aid of the civil authority, the Governor, if in his judgment the maintenance of law and order will thereby be promoted, may, by proclamation, declare the county or city in which the troops are serving, or any special portion thereof, to be in a state of insurrection."

In the later case of *Moyer vs. Peabody*, 212 U. S. 78, it was stated:

"In such a situation we must assume that he had a right under the State Constitution and laws to call out troops as was held by the Supreme Court of the State. The Constitution is supplemented by an act providing that 'when an invasion of or insurrection in the State is made or threatened the Governor shall order the National Guard to repel or suppress the same.' That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace."

Mr. Justice Holmes did not state in his opinion that the Supreme Court of the United States was bound by the construction placed upon the Constitution and laws of Colorado by the Supreme Court of that State, and though that may have been the case; nevertheless, it appears that he concurred in the construction placed upon the statutes and Constitution of Colorado by the Supreme Court of that State.

Under "martial law" the Governor may call out the troops; may order them to kill persons who resist and may cause offenders and insurrectionists to be restrained of their liberty. Regardless of whether the proclamation of the Governor of Colorado established a state of "martial law" in name, it appears from the opinion of Justice Holmes and from the opinion of the Supreme Court of Colorado that the governor had a power under his proclamation that could be exercised by him only under "martial law."

The Constitution of Montana provides that,

"The supreme executive power of the State shall be vested in the Governor, who shall see that the laws are faithfully executed. The Governor shall be Commander-in-Chief of the military forces of the State," * * * "and shall have power to call out any part, or the whole, of said forces to aid in the execution of the laws to suppress insurrection or to repel invasion." *(Constitution of Montana*, Art. VII, Secs. 5, 6.)

In *Ex Parte McDonald*, 49 Mont. 454, 143 Pac. 947, L. R. A. 1915 B, 988, the Supreme Court of that State, in connection with this provision of the Constitution, said:

"The Governor had the authority to proclaim a state of insurrection to exist in the County of Silver Bow, and to detail the organized militia of this state to suppress such insurrection, is settled by the express language of our Constitution."

It is respectfully urged that the Constitution of Montana confers no more power upon the Governor of that State than is conferred upon the Governor of Texas by the Constitution and statutes of this State.

There is one decided case which holds that the Governor of Texas has authority under the Constitution and laws of this State to institute "martial law." In *United States vs. Wolters*, 268 Fed. 69, Judge Foster said:

"There is no doubt that under the Constitution and laws of Texas the Governor is charged with the duty of enforcing the laws of the State, and has the authority to call out the militia to enforce the laws in case of riot, or breach of the peace, or imminent danger thereof." * * * *"I must conclude that the Governor had complete authority to institute martial law* in the city of Galveston. That is conceded by the relator. Since he had the authority to institute martial law, notwithstanding there is not statute of the State of Texas authorizing him to do

so, he could do anything necessary to make his proclamation effective." *(Italics ours.)*

The Government of Texas was not organized with the thought that it should last but for the day of its beginning. It was moulded and shaped and formed with the purpose that it should have an enduring existence and render a priceless service to mankind through an endless cycle of years.

The patriots, who met in a rude blacksmith shop at Washington on the Brazos to write the Declaration of Independence, while their fellow patriots held the Alamo, and those who hurled back the invaders of their homes upon the plains of San Jacinto, were not striving and fighting for the victories of a day, but to lay deep and broad in this great Southwest land the foundations of free government, equipped and ordered to survive the dangers of the frontier, famine, pestilence and war, and to last as long as men desired to live under a government of law. They were acquainted with the meaning and appearance of an invading army and knew that the answer to invasion was by meeting armed force with an armed resistance of superior strength. The scalping knife and the war cry of the Cherokee and Comanche in the forests, on the plains, and among the mountains of Texas were not legend to them. They knew that a government could not last unless there inhered in it the power to defend itself and to protect its citizens in their rights of life, liberty and

property. They knew that the defense of organized government against lawlessness required an available armed force and they were not afraid either to provide the force or its Commander-in-Chief, for they attended to both in the Constitution of the Republic of Texas.

And so, throughout the years the several Constitutions of this State have each provided that the Chief Executive should, among other things, be Commander-in-Chief of the military forces of the State, and they have enjoined upon him the responsibility of causing the laws to be executed. It was intended that this government should at all times be able to enforce its laws, continue its existence as an organized government, and have the power to accomplish both in the face of vicious lawlessness regardless of its power.

Therefore, there must be in this government—this government of Texas—somewhere a power to meet a lawless mailed fist with a mailed fist of superior strength, supported and sustained by law.

Will it be contended that this power is in the Legislative Department of the government? The Constitution does not attempt to place it there. The Legislature is the law making department, not the law executing department of the government. It has its sessions, its houses, its committees, its acts, its resolutions and its debates; and in the very nature of its organization and procedure is not pre-

pared to act promptly, in the face of extreme emergency which may arise in the form of insurrection or invasion even at a time when the Legislature is in session. This is sufficient reason why the framers of the Constitution should not, and did not, place the power to declare "martial law" and suppress insurrection in the hands of the Legislative Department of the government.

Is this power in the Judicial Department? The Constitution does not attempt to place it in this law construing and applying department of the government. Its petitions and answers, its citations and subpoenas, its decisions of law by judges and findings of facts by juries, and its appellate procedure at once suggest that the Judicial Department is not equipped to act promtly in the use of military force to suppress lawlessness in the form of insurrection.

The Constitution does provide that the Governor shall be the Chief Executive of the State; that he shall cause the laws to be faithfully executed; that he shall be the Commander-in-Chief of the military forces of the State; that he shall have power to call forth the militia to execute the laws, to suppress insurrection and repel invasions; and the statutes reaffirm these powers in the Executive Department of the government.

This is the power to proclaim "martial law" and suppress lawlessness where necessary by military force, whether in the form of insurrection, riot,

tumult or invasion, and even when it requires that life, liberty and property be taken. It is the power to compel obedience to law and act in defense of society against lawlessness.

And, when Judge Foster said in *United States vs. Wolters, supra,* that

"The Governor of Texas had complete authority to institute martial law",

it appears to appellants that he meant this necessary and inherent power of self defense that exists in the government had been reposed in the Chief Executive of the State by the Constitution and Statutes of Texas. If it is not there, apparently it exists only in the people; and, of course, to so hold would be to say that in the organization of the Government of Texas—a border state—no provision was made for the common defense.

"Martial law" like "police power" may be difficult, if not impossible of definition, especially when the attempt is made to define it in what may and may not be done under its declaration, and no attempt will be made to here define it or state its limits. At all events it is an exercise of the police power. "Martial law" may be used to repel invasion, suppress insurrection, tumult and riot, and to accomplish this end persons may be restrained of their liberty, life and property may be taken, where necessary to make effective the proclamation and to restore the orderly processes of the

government. So much is made evident from the cases above cited. If the term "martial law" arouses a prejudice or causes some to conjure the spectre of usurpation of power, then appellants say that the term may be abandoned and yet the Constitution and statutes of Texas are sufficient to repose in the Governor of the State authority to use the military forces to repel invasion, suppress insurrection and to effect that end he may under these provisions of law cause persons to be restrained of their liberty and where necessary cause life or property to be taken.

Certainly the powers exercised by the Governor of Colorado, considered in the Moyer cases, *supra*, and the powers exercised by the Governor of Montana, considered in the McDonald case, *supra*, properly belong to that military jurisdiction called "martial law," being the third kind of military jurisdiction described by Chief Justice Chase in the *Milligan case, supra.* It is not important that either the proclamations or the opinions of the courts use, or do not use, the term "martial law," the power exercised under the proclamations was a power of "martial law." If the Constitution and statutes of these states vested this authority in their respective Governors, then it seems to logically follow that like powers are vested in the Governor of Texas by similar provisions in the Constitution and statutes of this State.

The proclamation, above quoted, recites that

"Whereas, a state of insurrection, tumult, riot and breach of the peace does exist in the defined area" * * *

"Now, therefore, I, R. S. Sterling, Governor of the State of Texas," * * * *"declare that the conditions above described do exist and are clearly violative of the Constitution and laws of this State"* * * *

"And I do hereby declare martial law in said territory" * * *.

The case of *United States vs. Fischer*, 280 Fed. 208, seems sufficient authority to sustain the argument that this proclamation was effective to declare "martial law". The opinion says:

"Was the proclamation of the Governor the declaration of a state of insurrection, or were the military forces called into service merely as aides to civil officers for the purpose of assisting them in enforcing the laws? The proclamation does not use the word 'insurrection', but the condition described of lawlessness and disorder beyond the control of the civil authorities, and the declaration of martial law, are equivalent to a declaration of the existence of that organized resistance to authority known as insurrection. In re Charge to the Grand Jury, (D. C.) 62 Fed. 828; Allegheny County vs. Gibson, 90 Pa. 396, 35 Am. Rep. 670."

Point B.

When the Governor of Texas, in the exercise of his discretion, determines that a state of insurrection exists, or that there is imminent danger thereof, in a defined area and exercises the power of the office to proclaim the existence of such insurrection, or the imminent danger thereof, and calls the military forces into active service and directs such forces to suppress the declared insurrection, or imminent danger thereof, his declaration of the existence of the insurrection, or the danger thereof, is conclusive upon the courts during the period of the declared emergency and they may not on an injunction proceeding inquire into either the sufficiency of the facts to sustain the declaration or the motive of the Governor in making it. These powers are vested in the Governor exclusively by the Constitution and statutes of the State.

Quotations from decided cases form the most forceful and conclusive argument that can be brought to bear to sustain the position that the Courts will not on injunction proceeding inquire into the sufficiency of the facts to sustain the Governor's declaration that an insurrection exists or into the motive of the Governor in making the declaration.

This Court in *Moyer vs. Peabody, supra,* said:

"It is admitted, as it must be, that the Governor's declaration that a state of insurrection existed is conclusive of that fact."

In *Martin vs. Mott, supra,* this Court said:

"We are all of the opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons."

* * *

"Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts."

This Court said in *Luther vs. Borden, supra:*

"The state itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State, as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority."

In *Stewart vs. Kahn,* 78 U. S. 493, this Court said:

"The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution."

In *Keely vs. Sanders*, 99 U. S. 441, it was stated:

"Further than this, whether the military authority had been established throughout Shelby County before the commissioners entered upon the discharge of their duties, is a political question, to be answered by the executive branch of the government and not by the courts. In its nature it was incapable of being determined by the latter. Successive juries might give to it different and contradictory answers."

In *Marbury vs. Madison*, 1 Cranch 137, this Court said:

"By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience." * * * "whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political."

In *Story on the Constitution*, Vol. 2, p. 110, Second Edition, 1851, it is said:

"Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, which every officer, to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militia-man, who shall refuse to obey the orders of the President?" * * *

"At a very recent period, the question came before the Supreme Court of the United States for a judicial decision; and it was then unanimously determined, that the authority to decide whether the exigency has arisen belongs exclusively to the President; and that his decision is conclusive upon all other persons."

The following expressions of the Courts are pertinent:

"Therefore it is thought that this court should not undertake to make in advance a decision of that which is solely for the determination of the President of the United States; that is to say, the necessity of using troops in a state in any given emergency." *(Consolidated Coal & Coke Co. vs. Beale et al.*, 282 Fed 934.)

"This being true, the recitals in the proclamation to the effect that a state of insurrection existed in the county of San Miguel cannot be controverted. Otherwise, the legality of the orders of the executive would not depend upon his judgment, but the judgment of another coordinate branch of the state government." *(In Re Moyer, supra.)*

"The supreme executive power of the state is vested in the governor, and by the terms of the militia article of the Constitution he has power to call forth the militia to execute the laws of the state. Article 10, Sec. 2. In this particular the language of our Constitution is in substance the same as that of the Act of 1795, conferring the same power on the President of the United States; and the effect is the same, in that it places in his hands the sole power of judging and determining, from the facts in his possession, when the exigency has arisen which makes it incumbent upon him to call forth the military power of the state." *(Chapin vs. Ferry,* 3 Wash. 386, 15 L. R. A. 116.)

"It seems to be conceded that, if the Governor has the power to declare a state of war, his action in doing so is not reviewable by the courts. Of the correctness of this view, we have no doubt. The function belongs to the executive and legislative departments of the government, and is beyond the jurisdiction and powers of the courts." *(State ex rel. Mays vs. Brown,* 71 W. Va. 519, 77 S. E. 243, 45 L. R. A. (NS) 996.)

"Whether there was justification for the declaration of a state of war in this instance is not an open question. By all authority the declaration of a state of insurgency or war by competent authority is conclusive upon the court." *(Ex parte Jones,* 71 W. Va. 567, 77 S. E. 1029, 45 L. R. A. (NS) 1030.)

"On application for writ of habeas corpus, the truth of recitals of alleged facts in a proclamation issued by the governor proclaiming a certain county to be in a state of insurrection and rebellion will not

be inquired into or reviewed." (*In re Boyle*, 6 Idaho 609, 45 L. R. A. 832.)

"It will be observed that there is no limitation, either in the Constitution or statutes, upon the power vested in the Governor to order into active service the militia of the State, or to direct into what locality they shall go or operate. He is made the sole judge of the necessity that may seem to demand the aid and assistance of the millitary forces of the state in suppressing disorder and restoring obedience to the law . . . . But to his good judgment and sound discretion the law has left the final decision as to whether the military arm of the state shall be ordered into active service. If he acts wisely and prudently, well and good. If he acts hastily and unwisely or imprudently, there is no power in the courts to control or restrain his acts. Any attempt on the part of the judicial department of the state so to do would be an interference by one department of the government with the power lodged in another department." (*Franks vs. Smith*, 142 Ky. 232, 134 S. W. 484.)

In his commentaries on the *Constitution* of the United States (Vol. 2, Sec. 1211, Second Edition, 1851), Judge Story said:

"If the power of regulating the militia, and of commanding its services in times of insurrection and invasion, are, as it has been emphatically said they are, natural incidents to the duties of superintending the common defense, and of watching over the internal peace of the confederacy, these powers must be so construed, as to the modes of their exer-

cise, as not to defeat the great end in view. If a superior officer has a right to contest the orders of the President, upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier. And any act done by any person, in furtherance of such orders, would subject him to responsibility in a civil suit, in which his defense must finally rest upon his ability to establish the facts by competent proofs. Besides; in many instances the evidence, upon which the President might decide that there was imminent danger of invasion, might be of a nature not constituting strict technical proof; or the disclosure of the evidence might reveal important state secrets, which the public interest, and even safety, might imperiously demand to be kept in concealment. The act of 1795 was manifestly framed upon this reasoning. The President is by it necessarily constituted, in the first instance, the judge of the existence of the exigency, and is bound to act according to his belief of the facts. If he does so act, and decides to call out the militia, his orders for this purpose are in strict conformity to the law; and it would seem to follow, as a necessary consequence, that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, orders shall be given to carry the power into effect; and it cannot be that it is a correct inference, that any other person has a right to disobey them. No provision is made for an appeal from, or review of the President's opinion. And whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, the

general rule of construction is, that he is thereby constituted the sole and exclusive judge of the existence of those facts."

In *Luther vs. Borden, supra,* Judge Taney said:

"After the President has acted and called out the militia, is a circuit court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government, which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order."

Article II, Sec. 1, of the *Constitution of Texas* provides:

"The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, * * * and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."

Article IV, Sec. 7 of the *Constitution of Texas* has reposed in the Governor the power to call forth the militia to execute the laws and to suppress insurrections and repel invasions. To argue that the courts have the power to enquire into the sufficiency of the facts to sustain the Governor in the exercise of his discretion to call out the military forces is to argue out of the Constitution the provision separating the powers of government into departments. And, this applies as well to a review by the courts of the United States of the Governor's exercise of his discretion as to a review by the courts of Texas, for the guarantee in the Constitution of the United States (Art. IV, Sec. 4, Clause 1) of republican form of government to every state imposes a duty upon the Congress and the President and not upon the judiciary.

If the exercise of discretion by the Governor in calling out the militia were subject to judicial review in the face of emergencies, it would render invalid and useless the power given to him by the Constitution of the State to preserve and protect the life of the government from destruction by insurrection and revolt.

POINT C

When the Governor of Texas issues his proclamation declaring a state of insurrection, riot, tumult and breach of the peace, or imminent danger there-

of, to exist in a defined area and as Commander-in-Chief of the military forces of the State calls them into active service to suppress such conditions, he may make the ordinary use of the soldiers and direct them to do whatever appears to him to be reasonably necessary at the time to suppress the insurrection and restore the peace; and the courts may not, during the period of the declared emergency, by writ of injunction, control the details of the Governor's exercise of this power of government or the details of his use of the soldiers; under such circumstances the courts cannot by injunction substitute their judgment and discretion for that of the Governor in determining the means to be employed in suppressing or averting the existing or impending riot and insurrection.

Any argument that the courts can by injunction control the manner in which the Executive uses military forces under a declaration of "martial law" must be based upon a contention that the use violates the due process clause of the Constitution. "Martial law" is an exercise of the police power (the necessity for its exercise being here an executive prerogative) and it has been held that the due process clause of the Fourteenth Amendment to the Constitution of the United States was not designed to interfere with the power of the State to protect the lives, liberties and properties of its citizens. This rule may be subject to modification as to the equal pro-

tection clause, but there seems to be ample authority to sustain the position stated. *Barbier vs. Connolly*, 113 U. S. 27; *Pacific Gas & Electric Company vs. Police*, 251 U. S. 22; *Compagnie vs. Louisiana*, 186 U. S. 380. This principle should answer any assertion that resort may be had to injunctive process to control the manner and details of the use of troops, where their use has been found necessary by the executive in order to protect life, liberty and property. The discretion to determine what is necessary to make the proclamation effective being vested in the executive, appellants will hereinafter show that, when he finds a taking of property is necessary, the taking is with due process.

There is, however, other argument against the power of the courts to issue injunctions for this purpose.

The Constitution separates the powers of government into three departments. The Executive is charged with the enforcement of the law, and to perform this duty the Chief Executive is given the power to employ the use of the military forces of the State. Any attempt upon the part of the courts to control the manner in which he uses the military forces in the face of an emergency brought about by insurrection would be a clear invasion by one department of fields properly belonging to the other coordinate department.

In *Franks vs. Smith*, 142 Ky. 232, 134 S. W. 484, it was said:

"But to his good judgment and sound discretion the law has left the final decision as to whether the military arm of the state shall be ordered into active service. If he acts wisely and prudently, well and good. If he acts hastily or unwisely or imprudently, there is no power in the courts to control or restrain his acts. Any attempt on the part of the judicial department of the state so to do would be an interference by one department of the government with the power lodged in another department."

If the courts can attempt, during the emergency, to restrain a certain use of the soldiers which the Executive has found is necessary in order to make effective his proclamation, then it would be logical to say that the courts might nullify the whole movement by enjoining in the beginning the issuance, or threatened issuance, of a proclamation declaring an insurrection to exist and ordering soldiers to suppress it, upon the ground that it did not appear to the court that the nature of the insurrection was sufficient to justify the action. Appellants believe that ample authority has been cited to demonstrate that this power is not vested in the courts.

In *Martin vs. Mott, supra*, it was said:

"The law contemplates that, under such circumstances, orders shall be given to carry the power

into effect; and it cannot therefore be a correct inference that any other person has a just right to disobey them. The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts."

It was said in *Stewart vs. Kahn*, 78 U. S. 493, that

"The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution."

In the case of *Burnquist vs. Minnesota*, 168 N. W. 634, 3 A. L. R. 1476, the Supreme Court of Minnesota said:

"The authorities seem to agree that under Constitutions similar to that of this state, where all power and authority of government is vested in three distinct, co-ordinate, and independent departments,—the legislative, the executive, and the judicial,—the judicial has not the power to control, coerce, or restrain the action of the other two within the sphere allotted them by the Constitution wherein to exercise judgment and discretion. It would be unthink-

able that the courts of this state should attempt to enjoin the legislature from enacting or the governor from approving a statute, no matter how glaringly unconstitutional it might appear or how highly injurious its mere enactment might be to private interests."

Neither the Legislative Department nor the Judicial Department can dictate to the President, as Commander-in-Chief, the manner in which he shall conduct a war, its campaigns, its retreats, its advances, or its battles; but if he persists in a stubborn prosecution of plans which have proven unsuccessful and are bringing defeat and disgrace to the nation, the Congress may impeach him, but the courts would be without power to enjoin him or direct a plan or policy of war to him. *Pomeroy's Constitutional Law*, p. 483, (Ed. 1870).

In *United States vs. Fischer, supra*, it was said:

"When a state of war or insurrection exists, and the Governor has legally called into action the military forces of the state, the will of the commander becomes the controlling authority in the occupied territory, so far as he chooses to exert it, subject to the laws and usages of war. New Orleans vs. Steamship Co., 20 Wall. 387, 22 L. Ed. 354; United States vs. Diekelman, 92 U. S. 520, 23 L. Ed. 742; Luther vs. Borden et al, 7 How. 1, 12 L. Ed. 581; United States vs. McDonald (D. C.), 265 Fed. 754; In re Egan, 5 Blatchf. 319, Fed. Cas. No. 4,303;

Commonwealth vs. Shortall, 206 Pa. 165, 55 Atl. 952, 65 L. R. A. 193, 98 Am. St. Rep. 759; 40 Cyc. 383, 390."

Appellants believe that it has been conclusively shown that the courts are without authority to review the sufficiency of the facts to support the finding of the Governor that a state of insurrection exists and that the use of the military forces is essential to suppress it. Let it be assumed that soldiers are in the field under a declaration of "martial law" with orders to suppress the insurrection and restore order. A situation arises which the commanding officer believes so grave that he can only meet it by issuing orders to his men to shoot. The chances are that someone is going to lose his life. If the courts do not have the power to review the sufficiency of the facts upon which the Governor acted and exercised his discretion in the first instance, it cannot be logically contended that the courts have the power to restrain the order "commence firing" until the facts upon which the commanding officer and his subordinates issued the order have been subjected to judicial review, and until the courts have had opportunity to substitute their judgment for that of the military officers.

If the executive is vested with the discretion to determine the exigency requiring the declaration of "martial law", it logically follows that the executive together with the officers in charge of his mili-

tary forces are to determine the use of soldiers that is necessary to make the proclamation effective.

If the military forces in the field under declaration of "martial law" are faced by the armed forces of insurrection and the officer in command orders his men to fire, is the Chancellor going to stand by and issue a temporary restraining order or interlocutory injunction to restrain the men from placing their forefingers upon the triggers of their rifles until in the quiet of judicial proceeding the pleadings can be heard, facts reviewed and a solemn judgment arrived at and entered as to the necessity for the command?

It is a clear and unmistakable fact, concerning which there can be no debate, that the judiciary is not equipped to determine the strategy or tactics of military campaigns and is not in position to function with that rapidity essential to the conduct of a war, whether it be a foreign war or domestic insurrection. This field of governmental activity has been wisely left entirely to another department of the government. It is as logical to argue that the courts can force a declaration of "martial law" (in the absence of constitutional provisions prohibiting mandamus against the executive) as it is to argue that they can restrain its declaration. And, furthermore, it is just as logical to argue that the courts can issue orders to the soldiers to proceed along certain lines in suppressing insurrection, as it is to

argue that they can issue injunctions restraining them from proceeding along some other line. The decisions of these questions were from necessity left to another department of the government. There may be a responsibility after the emergency has past for a wrongful decision and an unlawful order and a consequent invasion of a private right, but certainly the courts cannot, during the existing of the emergency, assume to control the campaign conducted against the insurrection or riot, without assuming powers belonging to another department of government. *(Hartranft's Appeal*, 85 Penn. St. 433, 27 Am. Rep. 667.)

If the executive be a tyrant or despot in the use of this power which the Constitution vests in him, he is, as suggested in some of the cases, subject to impeachment; and, so he is not above the law or the courts, for the court of impeachment is a part of the judicial system. If his use of the power becomes despotic to the extent that he has destroyed a republican form of government, there is provision in the Constitution and laws of the United States whereby the United States Government may restore a republican form of government to any state.

In *Moyer vs. Peabody, supra*, Justice Holmes said:

"That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist, and, of course, that he may use the

milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace." * * *

"No doubt there are cases where the expert on the spot may be called upon to justify his conduct later in court, notwithstanding the fact that he had sole command at the time and acted to the best of his knowledge. That is the position of the captain of a ship. But, even in that case, great weight is given to his determination, and the matter is to be judged on the facts as they appeared then, and not merely in the light of the event."

It is said in *In re Boyle, supra*, that

"The statutes of this state make it the duty of the Governor whenever such a state or condition exists" * * * "to proclaim such locality in a state of insurrection" * * *. "It would be an absurdity to say that the action of the executive under such circumstances may be negatived and set at naught by the judiciary, or that the action of the executive may be interfered with or impended by the ju-juriciary."

The Supreme Court of Pennsylvania in *Wadsworth vs. Shortall*, 206 Pa. St. 165, 55 Atl. 952, 98 A. S. R. 759, said:

"The effect of martial law, therefore, is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and security

of life and property are concerned, there is no limit but the necessities and exigency of the situation. And in this respect there is no difference between a public war and domestic insurrection."

Again, in *United States vs. Fischer, supra,* it is said:

"In cases of military occupancy during war or insurrection, the passing of the military lines by persons without permission, the possession of arms and ammunition, the sale of intoxicating liquors, may cause the commander the loss of a battle, and yet these acts may not offend against the local laws. The usage in time of war has been to make regulations covering offenses in violation of the laws of war or of military discipline. Winthrop on Mil. Law (2d Ed) 1310, 1311."

In *Franks vs. Smith, supra,* the court said:

"For his conduct in ordering out and *controlling the movements and operations of the state militia,* the governor is answerable only at the bar of public opinion, unless it be that abuses might warrant impeachment proceedings." *(Italics ours.)*

In *Mayes vs. Brown,* 71 W. Va. 519, 77 S. E. 243, 45 L. R. A. (N. S.) 996, it is said:

"It seems to be conceded that, if the governor has the power to declare a state of war, his action in

doing so is not reviewable by the courts. Of the correctness of this view, we have no doubt. The function belongs to the executive and legislative departments of the government and is beyond the jurisdiction and powers of the courts. There is room for speculation, of course, as to the consequences of an arbitrary exercise of this high sovereign power"; * * *. "The sovereign power rests in the people and may be exerted through the Legislature to the extent of impeachment and removal from office of a governor for acts of usurpation and other abuses of power."

If the proclamation of the executive is final evidence of the existence of the insurrection (and appelants believe that has been demonstrated from the authorities), then the executive, as the officer charged with the duty of enforcing the law and suppressing the insurrection, must have the authority to make his proclamation effective. The courts have said that he may make the ordinary use of troops. The expression certainly implies that he may use his troops to go to the fountain head of the insurrection and suppress the insurrection by removing its cause. If in the exercise of his discretion the Governor determined that a suppression of the sale of fire arms would be effective to end the insurrection, it cannot be doubted, though the Constitution of Texas gives to every citizen the right to keep and bear arms in the lawful defense of himself and the state, that he could prohibit the sale of fire arms in the disaffected

area and make his order effective through the use of soldiers; if in the exercise of his discretion the Governor determined that the sale of intoxicating liquors, even though permitted by law, was the impediment in the way of restoring peace, he would have power to issue orders prohibiting its sale and make the order effective through the use of troops; if the mining of coal, or the refusal to mine it, was so determined to be the cause of trouble, the executive would have the power to order that the mines be operated or closed as in his judgment might be most effective to suppress the insurrection, and, having determined which course would be most efficacious to restore peace, he would have authority to make his orders effective by the use of military forces; and, if the executive determined, as in this case, that the cause of the trouble was the operation of oil wells, he would have power to end the insurrection by removing its cause through controlling the operation of the wells as in his judgment the situation might require. These acts upon the part of the executive would be nothing more or less than the exercise of a power which the law gives him to make effective his proclamation and restore peace and order. And, the courts could not, without invading the field of another department of the government, attempt to control by injunction this exercise of discretion.

If the sovereign people have seen fit in the Constitution to entrust the executive Department with

the discretion to determine the necessity and extent to which soldiers shall be used in "martial law", the courts cannot under the disguise of restraining an abuse of discretion actually presume to substitute their own discretion for that of an equally great department of government, without at the same time annihilating the line of division between the departments of government. As is said in *Hartranft's Appeal, supra:*

"What, then, are the duties, powers and privileges of the governor? In the language of the Constitution, Art. 4, Sec. 2, 'The supreme executive power shall be vested in the governor, who shall take care that the laws be faithfully executed.' Also, same article, Sec. 7, 'The governor shall be commander-in-chief of the army and navy of the Commonwealth, and of the militia, except when they shall be called into the actual service of the United States.' He is, also, invested with the appointing and pardoning powers; the power to convene the legislature in cases of emergency and to approve, or veto, bills submitted to him by the general assembly. It is scarcely conceivable that a man could be more completely invested with the supreme power and dignity of a free people. Observe, *the supreme executive power* is vested in the governor and *he is charged with the faithful execution of the laws*, and for the accomplishment of this purpose he is made Commander-in-Chief of the army, navy and militia of the State. Who then shall assume the power of the people and call this magistrate to an

account for that which he has done in discharge of his constitutional duties?" * * * "And if the courts can compel him to answer, why can they not compel him to act? All these things, we know, may be done in the case of private individuals; such an one may be compelled to answer, to account and to act. In other words, if from such analogy we once begin to shift the supreme executive power from him upon whom the Constitution has conferred it, to the judiciary, we may as well do the work thoroughly and constitute the courts the absolute guardians and directors of all governmental functions whatever. If, however, this cannot be done, we had better not take the first step in that direction. We had better at the outstart recognize the fact, that the executive department is a co-ordinate branch of the government, with power to judge what should or should not be done, within its own department, and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of these constitutional powers, the courts have no more right to interfere, than has the executive, under like conditions, to interfere with the courts."

POINT D

The State, acting through the Governor, may take private property located in the area in which insurrection, riot, tumult and breach of the peace, or imminent danger thereof, have been declared by proclamation to exist. The decision of the Governor that the taking of private property is necessary

to prevent the impending insurrection, riot, tumult and breach of the peace, or to suppress the existing insurrection, riot, tumult and breach of the peace, is conclusive, and a taking under such circumstances is with due process of law.

The power granted to the Governor while generally referred to as the power to declare and enforce "martial law" is actually the power to suppress and head off insurrection. Necessarily impied therein is the power to determine when insurrection exists or impends and the power to perform those acts which he deems necessary to suppress or head off the insurrection which exists or impends. This emphatically does not mean that he has power to violate a single provision of the constitution of the state or nation. It does not, for example, mean that he has the right to suspend the writ of habeas corpus. He has not that right. It does mean that his decision that property must be taken and his taking of that property constitute due provess of law.

Now, why does the power of the Governor to suppress and head off insurrection give to him the power to take private property when necessary to that end? Because of the sound and familiar legal principle that power to do a thing necessarily implies power to do all things necessary to do the principal thing. The only proposition which would authorize a decision that the right to take private property is not necessarily implied in the power to

suppress and head off insurrection is that taking private property cannot be necessary. This contention cannot stand. The contrary is clear. It may be necessary to take food to feed troops. It may be necessary to take weapons to combat the enemy. It may be necessary to destroy crops lest the enemy feed upon them, and homes lest the enemy shelter in them. It may be necessary to take arms and munitions of war lest the enemy employ them against the government. It may be necessary to prohibit a man from selling shotguns—a lawful business—lest some other man do an unlawful thing, i. e., murder a soldier with a shotgun.

It may well be supposed that the court recognizes that private property may be taken when necessary in suppressing or heading off insurrection, but in order to remove all doubt appellants quote the Supreme Court of the United States to that effect. In *Mitchell vs. Harmony*, 13 Howard 115, Chief Justice Taney said:

"There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner" * * *.

In the case of *United States vs. Russell*, 13 Wallace 623, the Supreme Court spoke as follows through Justice Clifford:

"Private property, the Constitution provides, shall not be taken for public use without just compensation, and it is clear that there are few safeguards ordained in the fundamental law against oppression and the exercise of arbitrary power of more ancient origin or of greater value to the citizen, as the provision for compensation, except in certain extreme cases, is a condition precedent annexed to the right of the government to deprive the owner of his property without his consent. 2 Kent, Com., 11th ed. 339; 2 Story, Const. 3rd ed. 596. Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized or appropriated to the public use, or may even be destroyed without the consent of the owner. Unquestionably, such extreme cases may arise, as where the property taken is imperatively necessary in time of war to construct defenses for the preservation of a military post at the moment of an impending attack by the enemy, or for food or medicine for a sick and famishing army utterly destitute and without other means of such supplies, or to transport troops, munitions of war, or clothing to reinforce or supply an army in a distant field, where the necessity for such reinforcement or supplies is extreme and imperative, to enable those in command of the post to

maintain their position or to repel an impending attack, provided it appears that other means of transportation could not be obtained and that the transports impressed for the purpose where imperatively required for such immediate use. Where such an extraordinary and unforeseen emergency occurs in the public service in time of war no doubt is entertained that the power of the government is ample to supply for the moment the public wants in that way to the extent of the immediate public exigency, but the public danger must be immediate, imminent, and impending, and the emergency in the public service must be extreme and imperative and such as will not admit of delay or a resort to any other source of supply; and the circumstances must be such as imperatively require the exercise of that extreme power in respect to the particular property so impressed, appropriated, or destroyed. Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown, and when shown, the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner."

So, regardless of considerable speculation to the contrary, this has been recognized by the Supreme Court as the law of the land for almost a century.

The power to take private property, when nec-

essary, of course, implies authority to determine when the taking is necessary.

The power then is discretionary, and to be executed by the Governor upon his own opinion of a certain fact, that fact being the necessity for the taking.

The rule was stated by Justice Story in *Martin vs. Mott, supra,* to be as follows:

"Whenever a statute gives a discretionary power to any person, to be executed by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts."

With all deference, appellants submit that this statement of the law is conclusive in this case. The sole and exclusive judge of the necessity of taking appellees' property has decided that the necessity exists, and this taking is in the eyes of the law a taking necessary to suppress and prevent insurrection, riot, tumult and breach of the peace, and is accordingly due process of law.

While due process of law in taking property may not be due process in taking life or liberty, it is certainly true that due process in taking life or liberty suffices as due process to take property.

Under the law, the pleadings and the evidence, the act is one which in so far as the court goes is necessary to be performed by the Chief Executive of a

sovereign State in order to suppress and prevent riot, tumult, insurrection, and breach of the peace wholly within that State. Has it ever been said, will it ever be said, can it ever be said, by any court, anywhere, at any time, that an act necessarily performed by the Governor of a State, in putting down and preventing that which is in its very nature a violation of a law endangering the very life of the State, is not "due process of law"? Appellants affirm that it has not been said by any court, cannot be said by any court, and will not be said by this court.

The statement just made is founded upon the decisions of the courts of this country, State and Federal. In the case of *Luther vs. Borden, supra*, Chief Justice Taney said:

"The State itself must determine what degree of force the crisis demands."

The detention of men without hearing, without indictment, without charges filed, without bail, is assuredly under ordinary circumstances not "due process of law"; but the courts have repeatedly held that a Governor and his subordinates, when they consider it necessary in suppressing and preventing insurrection, may detain and imprison a citizen without any of these; and that under such circum-

stances—which are the circumstances here—the detention was due process of law. It is the application of the old undoubted rule; what is not due process of law under one set of facts becomes due process of law under another set of facts. There is nothing more sacred in the right of property than in the right of personal liberty.

In *Re Moyer, supra*, the Supreme Court of Colorado said that such arrest and detention violated no constitutional right of Moyer, and specifically stated that he was not held "without due process of law".

As a result of this imprisonment, Moyer, after the determination of "martial law", sued the Governor of Colorado for damages. The Supreme Court of the United States in *Moyer vs. Peabody, supra*, speaking through Justice Holmes, said:

"Or course, the plaintiff's position is that he has been deprived of his liberty without due process of law. But it is familiar that what is due process of law depends on circumstances. It varies with the subject matter and the necessities of the situation. Thus, summary proceedings suffice for taxes; and executive decisions for exclusion from the country. Den Ex Dem. Murray v. Hoboken Land & Improv. Co., 18 How. 272, 15 L. ed, 372; United States v. Ju Toy, 198 U. S. 253, 263, 49 L. ed. 1040, 1044, 25 Sup. Ct. Rep. 644." * * * "When it comes to a decision by the head of a State upon a matter involving its life, the ordinary rights of individuals

must yield to what he deems the necessities of the moment. Public danger warrants the sustitution of executive process for judicial process."

In *Moyer vs. Peabody*, 148 Fed. 870, 876, it was said:

"Measures are sometimes necessary under the police power, that are severe, such as the summary destruction of property used for an unlawful purpose (Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. ed. 385); such as treating property used in an unlawful traffic as a nuisance (Mungler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. ed. 205; Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. ed. 346); such as the summary destruction of property to stay conflagration (Bowditch v. Boston, 101 U. S. 16, 25 L. ed. 980); such as the summary destruction of obscene books and diseased cattle (Sentell v. Railroad Co., 166 U. S. 698, 17 Sup. Ct. 693, 41 L. ed. 1169); such as the restraint of personal liberty in passing either into or out of an infected district, for the extermination of contagion (Compagnie Francaise, etc., v. Board, 186 U. S. 380, 22 Sup. Ct. 811, 46 L. ed. 1209), and the prohibitions found in the Fourteenth Amendment have never been construed to be an encroachment upon the exercise of the miltiary power within the lines here indicated —invoked to protect the very life of the social body. In both case we find their right and justification in the maxim, "Salus populi, suprema lex."

In the cases of *United States vs. Wolters, supra*, and *United States vs. Fischer, supra*, the Federal

Courts denied writs of habeas corpus, sought to release from custody men sentenced to prison by military commissions. In the last paragraph of the Fischer case, Judge Munger says:

"The conclusion is that assuming the acts of the Military Court to have been done in accordance with the laws of the State, there is nothing in the exertion of this power which contravenes the right of due process of law guaranteed by the Constitution of the United States."

To the same effect are the decisions in *State vs. Brown, supra,* and *Re Boyle, supra,* by the Supreme Courts of West Virginia and Idaho, respectively. *Franks vs. Smith, supra,* was a decision in a damage suit by the Court of Appeals of Kentucky, wherein the same decision was reached.

Appellees may specifically object that because this property is taken without a hearing, it is taken without due process. The contention will not stand up. As said by Justice Holmes in *Moyer vs. Peabody, supra:*

"Summary proceedings suffice for taxes, and Executive decisions for exclusion from the country."

The taking of property in a territory, where insurrection and imminent danger of insurrection exist, in order to suppress and head off insurrection, is not a taking where a hearing is essential to due process.

Here it would be possible to cite many cases where under the law of eminent domain property has been held to be taken in violation of due process, because no provision was made in advance for compensation. These cases, of course, are not applicable to a situation where property is taken in order to suppress or prevent insurrection.

Ordinary eminent domain cases are not cases which come to a decision by the head of the State upon a matter involving its life, when the ordinary right of individuals must yield to what the head of the State deems the necessities of the moment, and where public danger warrants the substitution of executive process for judicial process. It is the law that such a taking by the executive is an implied promise upon his part that the State will make proper compensation, and that the State is morally bound at some later date to pay to the private individual the reasonable value of his property taken during the emergency.

This is shown by the language quoted above from *Mitchell vs. Harmony, supra*, and the following from the case of *United States vs. Russell, supra:*

"Such a taking of private property by the government when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property

is imperative and immediate, and the danger, as heretofore described, is impending, and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice."

Thus it appears that this taking is not forbidden as "without compensation".

It will not do for appellees to allege that these cases where property is actually taken, as where food is taken and consumed by the troops, do not apply to cases such as this where they are merely prohibited from carrying on a lawful business. If this distinction be sound, it amounts to the fact that their property is not "taken" at all with or without due process, and since their property is not taken, they are entitled neither to an injunction nor to compensation.

Some of the language in the decisions of *Mitchell vs. Harmony, supra,* and *United States vs. Russell, supra,* appears upon casual reading to militate against the proposition that the Governor is the sole and exclusive judge as to whether or not it is necessary to take appellees' property. That this is not true, however, becomes readily apparent upon analytical examination.

Mitchell vs. Harmony, supra, was a case wherein

an army officer was sued in trespass for having appropriated the goods of a trader, by keeping the goods in his possession over the trader's protest, and then losing the goods. The case holds only that in an action for damages the person appropriating private property can only escape liability in damages by proving the necessity of taking. In other words, the wisdom of the law says the nature of the act is such that its restraint will not be countenanced, but its performer may be held liable for doing it. While it is apparently illogical to hold a man liable in damages for performing an act which equity will not restrain, it is a situation created by the frequently illogical and unjust theory of expediency. And the rule unquestionably is one having a salutary effect. Substantially it acts as a brake upon the action of the officer. *Mitchell vs. Harmony, supra,* and *United States vs. Russell, supra,* (which latter case adds nothing to the former), while certainly authority that a jury verdict in this case holding the appellants liable in damages will not be disturbed upon appeal, are just as certainly not authority for the argument that appellants' act should be restrained by a court of equity.

If the Governor found that it was necessary to control the production from appellees' oil wells in order to make effective his proclamation, the Constitution having vested him with discretion in finding the means of making his proclamation effective,

this finding and the subsequent control of the appellees' oil wells were all with due process of law. *Clearing House vs. Coyne*, 194 U. S. 497; *Weimer vs. Bunbury*, 30 Mich. 201.

Whether or not the Governor made the finding is to be determined from the record in this case and appellants submit that when his proclamation and the record are consulted that there is no question but that he did conclude that the control of appellees' wells, along with the other wells in the field, was not only necessary, but the only effective way to end the existing or avert the threatened insurrection. To another the contrary might have appeared, but it was to the Governor of Texas that the Constitution had confided these powers, and it was the then Governor of Texas that the people had elected to exercise these powers and exercise this discretion. When he made his finding and determined the necessity of his action that met fully the requirement of due process of law.

When in adopting the Constitution of Texas (Art. IV, Sec. 7) the people ordained that the Governor should be Commander-in-Chief of the military forces of the State and that he should "have power to call forth the militia to" * * * "protect the frontier from hostile incursions by Indians and other predatory bands", though they may not have actually had in mind another provision of the Constitution of Texas (Art. I, Sec. 19) providing that "no citizen

of this State shall be deprived of life, liberty, property, privileges or immunities or in any manner disfranchised, except by due course of the law of the land", it is clear that from the standpoint of judicial construction no other conclusion could be reached than that the finding of the executive of the necessity for use of military forces "to repel hostile incursions by Indians or other predatory bands" and his finding that the taking of life and property was necessary to the protection of the frontier, amount to a substitution of executive process for judicial process and constitute, under such circumstances, "the due course of the law of the land". This is an illustration that what is not due process of law under one set of circumstances may be due process of law under another set of circumstances. If the Governor of Texas,—a frontier state—found it necessary to call out the military forces to repel marauding bands along the one thousand mile southern and western border of this State and to protect life and property from such bands, there can be no question but that his finding of the existing necessity for the use of military force would be final upon the courts. If in the prosecution of his duties in this respect, he found it necessary to quarter soldiers on a Texas ranch, and for that purpose and to that extent to take the property of a citizen; or, if he found it necessary for the purpose of discharging his duty to take mounts from a ranch for the use of his sol-

diers; or, if he found it necessary to direct his soldiers "to shoot and shoot to kill", there can be no question but that such taking of property and life would fully meet every requirement of due process of law and of due course of the law of the land. It is difficult to imagine the processes of the Court restraining the Governor from doing the above enumerated things under such circumstances until judicial inquiry could pass upon the existing necessity.

So, in this case when the Governor found as a fact that it was necessary to control the production of appellees' wells in order to suppress the existing or avert the impending insurrection, his finding of the necessity constituted due process of law.

It is not important, let us repeat, whether the facts existing would appear to another as sufficient to justify the finding; it is only important that the finding was made by the Governor of Texas; and if it was made, the requirement of due process of law was fully met.

That a finding of necessity was made is important, but that facts existed to sustain the finding, which might appear different to men of differing judgment and varying courage, is neither essential nor important; and the Courts are without jurisdiction to inquire into the sufficiency of the facts. The various proclamations and orders issued by the Governor and his testimony upon the trial are the evi-

dence, that the finding was made, and show that a finding of necessity was made.

The Governor's motives in making the findings are questions that become unimportant because it was the case of an officer vested with a discretion finding the necessities, and exercising his discretion.

The Courts could not weigh the sufficiency of the facts to sustain his finding, or say that the necessity did not reasonable appear, without substituting their discretion for that of the Governor's and thereby cross the line of division between the judicial and executive departments of the government. As was said in *Mississippi vs. Johnson*, 4 Wall. 475:

"Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed" * * *. "The duty thus imposed upon the President is in no just sense ministerial. It is purely executive and political.

"An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized in the language of Chief Justice Marshall as 'an absurd and excessive extravance'."

And, "The Congress is the legislative department of the government, the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

"The propriety of such interference will be clearly seen upon consideration of its political consequences.

"Suppose the bill filed and the injunction prayed for are allowed. If the President refuses obedience, it is needless to observe that the Court is without power to enforce its process. If, on the other hand, the President complies with the order of the Court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and the legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this Court interfere in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a Court of Impeachment? Would the strange spectacle be offered to the public wonder of an attempt by this court to arrest proceedings in that court?

"These questions answer themselves."

The expression of the Court in *Louisiana vs. McAdoo*, 234 U. S. 627, further enforces the position that the courts will not in cases like this interfere with the Governor's exercise of discretion or attempt to substitute their discretion and judgment for that of the executive. It is said:

"There is a class of cases which holds that if a public officer be required by law to do a particular thing, not involving the exercise of either judgment or discretion, he may be required to do that thing upon the application of one having a distinct interest in the doing of the act. Such an act would be

ministerial only. But if the matter in respect to which the action of the official is sought is one in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official entrusted by law with its execution. Interference in such cases would be to interfere with the ordinary functions of government."

Appellants urge that the Courts can not lawfully inquire into the sufficiency of the facts, or substitute their judgment in cases like this for the judgment of the Executive on the issue as to whether or not the facts justify the conclusion reached by the Executive that it is necessary to take property; and that the Courts cannot lawfully substitute their discretion for that of the Governor, in such cases as to how the property shall be taken or the amount or extent of the taking. They may call upon him later, after the emergency has past, to account for the things that he has done,—we are not considering that question or attempting to express a view upon it—but while the emergency lasts the Courts cannot properly, and, therefore, should not, place themselves above the executive department by interposing their judgment and discretion where the law has made it the duty of the executive to use his judgment and discretion.

THEORY THAT UNDER DECLARATION OF MARTIAL LAW THE SOLDIERS ARE CALLED OUT TO ACT AS CIVIL OFFICERS WITH NO GREATER POWER THAN CIVIL OFFICERS IS ERRONEOUS.

A holding that under a declaration of "martial law" the troops are called out to act as civil officers with no greater power than the latter would amount, under certain circumstances, to a complete destruction of the power given an executive to use soldiers to suppress insurrection and cause the law to be executed.

While it is true as pointed out in *In re Moyer, supra*, that,

"The Governor, in employing the militia to suppress an insurrectiton, is merely acting in his capacity as chief civil magistrate of the State and although exercising his authority—conferred by the law through the aid of the military under his command, he is but acting in a civil capacity";

nevertheless, the power which exists in the Governor under such circumstances, and through him in the military forces which he employs, is different from that of ordinary civil officers because of the very necessities of the occasion. In instances of industrial trouble, where it has been found necessary to use the military forces, the need arises, it may be argued, not from inability of the local civil officers to control the situation, but from indifference or unwillingness

upon their part to use their ultimate power to enforce the law and preserve the peace. Instances can be imagined in which the local civil officers are in sympathy with the insurrectionary movement and in which one of the first necessary duties of the military forces would be to temporarily suspend or remove the local civil officers, in order to gain the ultimate object. The case of *United States vs. Wolters, supra*, furnishes an illustration of an instance in which the military authorities determined the need of suspending civil officers. The case of *In re Louis Crim*, District Court of the Eighty-fourth Judicial District of Texas, Hutchinson County (unreported), when the military forces were used in Borger, Texas, in 1929, after the assassination of the District Attorney, furnishes another instance in which the suspension of the local officers was deemed to be necessary in order to accomplish the purpose of ending lawlessness and restoring the peace. Illustrations can be given without overtaxing the imagination in which the local civil officers would be the real insurrectionary force, and to say that the Governor's military forces are merely to act with no more power than local civil officers would render such forces useful for nothing except parades.

EX PARTE MILLIGAN.

It is proper in this brief to discuss the case of *Ex Parte Milligan, supra*, and its applicability to this

case. There were three questions considered in that case:

(1) On the facts stated in said petition and exhibits, ought a writ of habeas corpus to be issued?

(2) On the facts stated in said petition and exhibits ought Lambdin P. Milligan to be discharged from custody as in said petition prayed?

(3) Whether upon the facts stated in said petition and exhibits, the military commission mentioned therein had jurisdiction legally to try and sentence Milligan in the manner and form as in said petition and exhibits is stated.

The Court answered the first and second questions in the affirmative and the third in the negative. The case then holds, and holds only, that under the particular facts of the case the military commission lacked jurisdiction to try Milligan and sentence him to death, and that the writ of habeas corpus should issue at his instance and he be discharged. Barring certain procedural points, there were no other questions before the Court.

The controlling fact in the Milligan case, the pivotal point upon which the opinion turned, was this—in the geographical entity wherein the military commission functioned and claimed jurisdiction, there existed no state of affairs authorizing it to function as it did and conferring upon it jurisdiction to try Lambdin Milligan and sentence him to death.

This is clear from the most causal consideration of the questions; for if the Court answers the third question in the negative, i. e., holds that the Commission had no jurisdiction, the affirmative answers to questions 1 and 2 follow without argument.

Consider the opinion of the majority. Having laboriously and lengthily argued the question of jurisdiction, and decided it in the negative, the Court briefly states the logical sequence, "the two remaining questions in this case must be answered in the affirmative".

Turn to the arguments of Milligan's counsel. The first question discussed by David Dudley Field is "Was the military commission a competent tribunal for the trial of petitioners upon which they were convicted and sentenced?" Jeremiah Black stated to the Court: "The case before you presents but a single point and that an exceedingly plain one", and then says, "Keeping the character of the charges in mind, let us come at once to the simple question upon which the Court below divided in opinion: 'Had the commissioners jurisdiction—were they invested with legal authority to try the relators and put them to death for the offense of which they were accused' ". And Garfield sums it up: he says, "Had the military commission jurisdiction legally to try and sentence the petitioners: Upon the determination of this question the whole cause rests".

The Court was unanimous upon the answers to

the certified questions. Unanimously they held that no authority had invested the military commission with jurisdiction, and any holding beyond this is obviously dicta. The facts in the Milligan case limit the scope of its opinion to cases where the military authority asserts jurisdiction in a peaceful locality where no person, pursuant to constitutional and statutory authority, has proclaimed a state of riot, or insurrection, to exist or impend. Five members of the Court, it is true, went beyond the proper bounds which were limited to "the facts stated in said petition and exhibits. In the broadest terms they stated that "Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction". They stated that martial rule could not exist where the courts were open and unobstructed in the exercise of their jurisdiction. It was evidently this expression that the Chief Justice and three of the Associate Justices had in mind when they stated,

"We are unwilling to give our assent by silence to expressions of opinion which seem to us calculated, though not intended, to cripple the constitutional power of the government and to augment the public dangers in time of invasion and rebellion."

The Chief Justice and those who concurred with him in the views expressed in the dissenting opinion,

all concurred in the actual decision reached in the majority opinion, but they did not consent to certain of the statements in the majority opinion.

The difference between the Milligan case and the case at bar rests in the fact that in the case at bar a competent authority had declared a defined area to be in a state of insurrection and by proclamation had instituted "martial law".

In the case of *United States vs. Adams*, 26 Fed. (2d) 141, (cited by the trial court), it is stated:

"The order was not attested by or filed with the Secretary of State, as state papers are, nor issued as a proclamation. It was issued direct to the Adjutant General.

"It is agreed that no attempt was made to declare martial law" * * *. "It is immaterial, however, because the State's counsel with commendable frankness toward the Court admit that martial law has not been declared and does not exist in these two counties."

That case is distinguished from the case at bar by the difference in the nature of the executive orders involved in the two cases.

In *Ex Parte Lavinder*, 108 S. E. 428, no military force was placed in command of the affected area,

but the Adjutant General was present undertaking to direct the civil authorities. The Court correctly distinguishes between the status of such an operation and one in which, as in the instant case, there is actual occupancy of the territory by military forces.

The positions taken in this argument do not place the Governor of the State above the Courts or superior to the Constitution and laws. The Executive Department is placed upon an equal plane with the Courts. The Governor remains subject to the Constitution and statutes and must respect and obey each. He is subject to prosecution in the criminal courts for violation of the criminal laws; he is subject to suit for damages after the emergency has past for any unlawful invasion of private rights; and, he is subject to the actions of a Court of Impeachment for a misuse of the power reposed in him. But, it is contended that the Courts do not have the power by injunction to restrain him from using militatry forces to suppress insurrections or to control the details in which the military forces may be used when in the exercise of his discretion he has determined that insurrection exists or impends and that military force and the taking of property are necessary to restore the peace.

It is respectfully submitted that the Governor of Texas, having determined in the exercise of his dis-

cretion that a state of insurrection existed and that there was imminent danger thereof; and having found that the use of military forces was necessary to preserve the peace, restore order and enforce the law; and having further found that to make effective his proclamation and accomplish a restoration of peace and order, it was necessary to control the production of oil from the oil wells located in the affected area; the Courts are without power on an injunction proceeding to restrain or control these acts of the Governor.

WHEREFORE, it is respectfully submitted that the judgment of the Trial Court should be reversed and that the injunction heretofore granted should be dissolved.

Respectfully submitted,

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